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Supreme Court, U.S.
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No. 10-1111

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In The

Supreme Court of the United States

ALFRED P. FUSI,

Petitioner,

v.

STEVEN O'BRIEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, the fact that trial counsel had been assigned to the case two days prior to trial and had not met or otherwise interviewed the petitioner until moments before jury empanelment, is sufficient grounds for application of a presumption of prejudice under the Sixth Amendment in evaluating a claim of the ineffectiveness of counsel.

Whether, the presentation of the factual substance of the petitioner's claim, combined with citation to the Sixth and Fourteenth Amendments, in state court, was sufficient for a finding of exhaustion.

Whether, the petitioner satisfied his burden of demonstrating prejudice in evaluating a claim of the ineffectiveness of counsel.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alfred P. Fusi, prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on September 16, 2011.

OPINIONS BELOW

On March 3, 2003, petitioner filed a fifth motion for new trial in the Essex County Superior Court of the Commonwealth of Massachusetts and on December 4, 2003, that court denied petitioner's motion without an evidentiary hearing. Appendix 44. On December 20, 2003, petitioner filed a notice of appeal and on October 11, 2006, the Massachusetts Appeals Court issued a decision, pursuant to Rule 1:28, denying petitioner's motion for new trial. Appendix 41. *Commonwealth v. Fusi*, 67 Mass. App. Ct. 1108 (2006). On November 20, 2006, the Supreme Judicial Court of Massachusetts, denied petitioner's application for further appellate review. Appendix D. *Commonwealth v. Fusi*, 447 Mass. 1113 (2006). Petitioner filed the instant petition for writ of habeas corpus on May 17, 2007 in the United States District Court for the District of Massachusetts, which on December 5, 2008 denied the petition in *Fusi v. O'Brien*, 588 F. Supp. 2d 158 (D. Mass. 2008). Appendix 25. The District Court granted a Certificate of Appealability on June 10, 2009 in *Fusi v. O'Brien*, 626 F. Supp. 2d

135 (D. Mass. 2009) Appendix 20. The Court of Appeals for the First Circuit, Boudin, Selya, and Gajarsa, J.J., in *Fusi v. O'Brien*, ___ F.3d ___ (1st Cir. 9/16/2010), affirmed the decision of the District Court on September 16, 2010, Appendix 1, and on December 7, 2010, denied a Petition for Rehearing and Rehearing En Banc, Appendix 58.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on September 16, 2010. Appendix 1. A timely Petition for Rehearing and Rehearing En Banc was denied on December 7, 2010. Appendix 58.

The jurisdiction of this Court is invoked pursuant to, 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

> accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In his petition for a writ of habeas corpus, petitioner raised one claim for relief, that his trial was in effect a "sham," in that petitioner's right to the effective assistance of counsel, guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States, was not only violated, but completely eviscerated in that trial counsel met him for the first time, minutes before trial commenced.

Trial counsel, Richard Chambers, was employed by the law office of his father-in-law, Alfred Farese,

whom petitioner's family had retained to represent petitioner; however, two days prior to trial, Farese assigned Chambers to try the case. Chambers did nothing to prepare for trial; he did not conduct an investigation; he did not interview or attempt to interview the Commonwealth's witnesses; he did not contact nor prepare available defense witnesses to testify; and he did not prepare or attempt to prepare petitioner to testify, as he met petitioner on the morning trial commenced moments prior to jury empanelment. Chambers learned the facts of the case as the Commonwealth presented evidence and admitted that he, "was shooting from the hip" as the case progressed. Petitioner has continuously maintained his innocence and after serving 27 years in prison, he remains incarcerated.

In the context of meeting petitioner for the first time, as trial commenced, it must be recognized that this was a "stranger" rape case, based entirely on identification by the victim. There was no physical evidence linking petitioner in any regard to the offense. The victim was attacked at 3:00 a.m. in a residential neighborhood while walking home from a bar. Her ability to observe and identify her assailant was severely limited by several critical and undisputed facts: she admitted that she had consumed five alcoholic drinks in the hours immediately prior to the assault; she stated that her assailant was a stranger; she testified that a white handkerchief concealed her assailant's mouth and nose for much of the assault; she claimed that at the outset of the assault, she was

struck in the jaw and rendered unconscious; and that the entire incident was infused with surprise, stress and fear. In addition, the reliability of the identification process was suspect. The victim identified petitioner from a seven photo array assembled and administered by Saugus Police Department Officer Michael Annese, six days after the incident. Less than twelve hours after the assault, the victim viewed a Saugus High School yearbook in an effort to identify her assailant. Although petitioner's photograph clearly appeared in four separate places in the yearbook, she failed to identify the petitioner.[1]

There is also cause to believe that Officer Annese was extremely biased towards petitioner. Annese was a neighbor of petitioner and upon learning of the victim's allegation, he claimed that he suspected petitioner and requested the Chief of the Saugus Police Department to assign him to investigate the case. Although such investigations were usually handled by detectives and Annese was a patrolman, he was allowed to conduct an investigation. Upon taking a statement from the victim, Annese assembled a photograph array which included petitioner's photograph. Annese also conferred several times with the owners of the property on which the incident

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[1] This fact not only undermines the reliability of the subsequent identification, it also raises the issue that the victim identified petitioner's photograph from the array because his photograph was familiar to her from the yearbook, as a result of a phenomenon known as "unconscious transference."

occurred, the Bartolos. Although Mrs. Bartolo was home at the time of the incident and the victim stated that she was screaming during the course of the attack, Mrs. Bartolo stated that she had not heard any such screams. Annese returned to Mrs. Bartolo's home several times and insisted that she must have heard something; Mrs. Bartolo maintained that she had not heard anything.

On August 13-14, 1986, the trial judge conducted an evidentiary hearing on petitioner's second motion for a new trial, which was the first motion that raised a claim of ineffective assistance of trial counsel. At that hearing, Mrs. Bartolo testified that on the morning after the incident, she discovered the victim and several friends in her back yard. The victim explained that she had been raped at that location earlier that morning. At a later date, Annese at the Bartolo home, asked Mrs. Bartolo, if she had heard anything on the night of the incident and she indicated that she had not. Annese returned to the Bartolo home on approximately four to five subsequent occasions and repeatedly insisted that Mrs. Bartolo must have heard something on the night of the incident. Despite his badgering, Mrs. Bartolo was adamant that she had not heard anything. Mrs. Bartolo also testified that there were no lights in her back yard or in the back of her home on the night of the incident, with the exception of a small nightlight in her kitchen. Mrs. Bartolo disclosed this information to Annese.

Chambers testified that his father-in-law, Alfred Farese, assigned him to represent petitioner;

however, he claimed that he could not recall when the case was assigned to him. He readily admitted, however, that he had not interviewed the Bartolos and that he had not made an effort to do so prior to trial. He also admitted that when he first viewed the crime scene, he did not attempt to speak with either of the Bartolos. Chambers claimed, that after the victim testified, he returned to the scene and attempted to speak with the Bartolos, two or three times, to discuss the lighting, but was not able to make contact with them. Chambers claimed that petitioner's father contacted a constable and instructed her to summons the Bartolos for trial. He testified that the Bartolos were not served with a summons because they were not home when the constable went to their home. Chambers claimed that someone told him that the Bartolos were on vacation and would not be available for trial.[2]

In 2003, petitioner's new counsel contacted Chambers, who revealed several facts which he had not disclosed at the prior evidentiary hearing. Chambers admitted that Farese assigned him petitioner's case two days before jury empanelment, in this life felony case. Chambers also admitted that to that point, "based on my personal knowledge, no investigation had been conducted on Mr. Fusi's Essex rape

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[2] Mrs. Bartolo denied that she and her husband were on vacation during the trial. To the contrary, she recalled receiving a subpoena for trial, but was "disqualified or dissuaded against going to court" by the Assistant District Attorney.

case prior to trial by any private investigator or any attorney with the Farese law firm." Chambers admitted that he did not conduct, " . . . any investigation of this case prior to trial or during the course of the trial, with the exception of going to the crime scene." Chambers did not speak to petitioner until he was brought to the courthouse for trial on the day of trial when he also assembled a witness list.

Petitioner's then counsel also learned of facts which explained Chambers' previous evasiveness and untruthfulness regarding his testimony at the initial evidentiary hearing in 1986 and the reason that he was willing to be more forthcoming in 2003. Chambers in 1986, was a member of the Massachusetts Bar; however, he was involved in litigation to protect his license to practice law. Specifically, Chambers was the subject of a pending petition for discipline filed by the Massachusetts Board of Bar Overseers. The pending petition alleged four counts of misconduct involving four different clients. In three of the counts, Chambers was charged with failing to perform services that he had promised to perform and in one case, Chambers falsely claimed that he had performed the agreed services. In 2003, Chambers' circumstances had changed as in 1994, the Board of Bar Overseers filed a second petition for discipline and in 1995, the Supreme Judicial Court had suspended his license to practice for six months. In 1999, the Supreme Judicial Court denied Chambers' petition for reinstatement, which ended his legal career. At the time that Chambers signed his affidavit in

2003, he understood that he would not again practice law.[3]

The Massachusetts Superior Court denied petitioner's motion for new trial,[4] Appendix 44-57, and the Massachusetts Appeals Court affirmed that decision. Appendix 41-43. Thereafter, the Massachusetts Supreme Judicial Court, denied further appellate review. Appendix 40.

The Proceedings In The District Court

In Petitioner's Motion for Evidentiary Hearing, filed pursuant to Rule 8 of the Rules Governing Habeas Corpus Cases in the District Court, petitioner asserted, *inter alia*, that he, " . . . has been on a quest to prove his actual innocence and to demonstrate that

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[3] Chambers received an informal admonition from the Massachusetts Board of Bar Overseers on June 30, 1976; he received another informal admonition for neglect on November 18, 1981; he was publicly censured in 1987 for conduct relating to his representation of three different clients during the period 1985 to 1997 and for failure to cooperate with bar counsel in violation of S.J.C. Rule 4:01, § 3 *Matter of Chambers*, 5 Mass. Atty. Disc. R. 56 (1987); he was suspended for six (6) months by the Board of Bar Overseers on December 5, 1995, *Matter of Chambers*, 412 Mass. 256, 11 Mass. Atty. Disc. R. 31 (1995), and on March 26, 1999, the Supreme Judicial Court ordered that his petition for reinstatement be denied.

[4] It must be noted that at a resentencing hearing on October 29, 1996, in the face of the state court imposing a lesser sentence, petitioner continued to maintain his actual innocence and stated, "I did not do this crime." The court ordered the original sentence to stand.

he did not receive a fair trial." Petitioner proffered that the following witnesses would testify at an evidentiary hearing:

> *Richard Chambers*: Trial counsel, who was disbarred in the Commonwealth of Massachusetts in 1995. On information and belief, Chambers would testify that at the time of petitioner's trial, he was employed by and/or practiced in the law offices of Alfred Faresse, who is now deceased. Chambers was the son in law of Faresse. Petitioner's family retained Faresse to represent petitioner; however, approximately two days prior to petitioner's trial, Faresse assigned and/or requested Chambers to represent petitioner at trial. Chambers was not prepared to represent petitioner at trial; he did not conduct an investigation nor did he attempt to do so; he did not confer with or attempt to confer with the Commonwealth's witnesses prior to trial; and he did not confer with petitioner until he met petitioner on the morning of trial. Other than the nature of the charge that petitioner was facing, although Chambers may have known who petitioner was from his presence in Faresse's office, he knew virtually nothing about this case.
>
> Chambers did not specifically recall whether or not the District Attorney's Office provided him with a copy of two police reports and the statement of the victim; however, Chambers did aver that he would have used a statement given to the police by the victim to impeach her credibility and her

> description of the events, if he had such a statement at trial.

A hearing on petitioner's motion for evidentiary hearing was held in the District Court on November 21, 2008. During the course of that hearing, the Court, Gorton, J., stated that, petitioner made, " . . . a strong argument for the first prong of the *Strickland* test" and inquired as to the second prong, "How would any of this change the outcome of the case." The Court issued a Memorandum and Order on December 5, 2008, denying Petitioner's Motion For An Evidentiary Hearing and dismissing the petition. *Fusi v. O'Brien*, 588 F. Supp. 2d 158 (D. Mass. 2008). Appendix 25. A presumption of prejudice in accordance with *United States v. Cronic*, 466 U.S. 648 (1984), was not considered by the District Court which held that:

> The issue in this habeas petition is whether Fusi was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The landmark federal case is *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which provides that, in order to succeed on a claim of ineffective assistance of counsel, a petitioner must show that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. The element of deficiency requires that: . . .
>
> counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment . . . [i.e.] that counsel's representation fell below an

> objective standard of reasonableness. *Id.* at 687-88.

Appendix 33-34.

Pursuant only to the standard announced in *Strickland v. Washington*, *Id.*, the District Court held that:

> Moreover, even if the question of prejudice in Fusi's case could be considered a 'close call' under the standard set forth in *Strickland*. AEDPA prohibits this Court from reaching an independent decision on that issue. . . . Rather, this Court is to decide only whether the state court's application of the standard was unreasonable. Within those constraints, this Court finds that Fusi's factual allegations, even if true, do not overcome the deference afforded by AEDPA to the state courts' determination that he failed to establish prejudicial ineffective assistance of counsel. Thus, the Court concludes that an evidentiary hearing is unwarranted.

Appendix 38-39.

The District Court concluded that the evidence petitioner proffered:

> . . . even if true, would not . . . be sufficient to show that the state court's denial of a new trial for Fusi was contrary to, or involved an unreasonable application of, the Supreme Court precedent of *Strickland*. See, 28 U.S.C. § 2254(d)(1). The evidence may well be sufficient to satisfy the first prong of *Strickland* by demonstrating that Fusi's counsel was deficient . . .

> The state court was not . . . unreasonable in finding that the evidence fails to satisfy the second prong of *Strickland*, which requires Fusi to show he was prejudiced by Attorney Chambers' representation. Indeed, Fusi has failed to carry his burden of proving that Attorney Chambers' deficient lawyering was so serious as to undermine confidence in the rape conviction.
>
> . . .
>
> Moreover, even if the question of prejudice in Fusi's case could be considered a 'close call' under the standard set forth in *Strickland*, AEDPA prohibits this Court from reaching an independent decision on that issue. . . . Rather, this Court is to decide only whether the state court's application of the standard was *unreasonable*. Within those constraints, this Court finds that Fusi's factual allegations, even if true, do not overcome the deference afforded by AEDPA to the state courts' determination that he failed to establish prejudicial ineffective assistance of counsel. Thus, the Court concludes that an evidentiary hearing is unwarranted.
>
> In the process of considering Fusi's motion for an evidentiary hearing, the Court has necessarily considered the merits of his petition for federal habeas corpus relief. In so doing, the Court has determined that Fusi is not entitled to such relief and, therefore, his petition will be dismissed. (citations omitted)

Appendix 38-39.

The District Court's Certificate Of Appealability

In Petitioner's Application for a Certificate of Appealability, petitioner contended that the District Court's decision, " . . . relies on conflicting case law, a premature summary dismissal of the petition and a clearly erroneous holding denying petitioner's motion for an evidentiary hearing, to which he was entitled as a matter of right."

In its Memorandum and Order issued on June 10, 2009, allowing petitioner's motion for a certificate of appealability, the District Court explicitly stated that in considering petitioner's motion for an evidentiary hearing, it accepted petitioner's " . . . factual allegations as true and considered whether they would entitle him to federal habeas corpus relief under 28 U.S.C. § 2254(d)(1), which is available when a state court decision was 'contrary to, or involved unreasonable application of, clearly established federal law.'" The District Court determined that the state courts' denial of petitioner's motion for new trial did not satisfy the § 2254(d)(1) standard because: "under the relevant federal law set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), whether Fusi had been prejudiced by Attorney Chambers' shortcomings, and thus whether his Sixth Amendment right had been violated, was at best only a 'close call.' Hence, the state courts did not appear unreasonable in finding no Sixth Amendment violation." Appendix 22-24.

The District Court recognized that because the petition, " . . . was denied on the merits, this Court may issue a COA if 'the petitioner . . . demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In granting a certificate of appealability, the District Court applied this standard and held that:

> The Supreme Court has recognized that 'complete denial' of counsel at a 'critical stage' of trial creates a presumption that the trial was so unfair as to violate the defendant's Sixth Amendment right to effective assistance of counsel. See *Bell v. Cone*, 535 U.S. 685, 695-96 (2002), citing *United States v. Cronic*, supra at 658. That presumption is based on the notion that certain circumstances 'are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' *Cronic*, 466 U.S. at 658.
>
> Fusi argues that a COA is warranted in his case because the Court failed to apply such a presumption arising from Attorney Chambers' ineffective assistance and, in particular, his failure to confer with Fusi before trial. In support of that contention, Fusi cites *Mitchell v. Mason*, 325 F.3d 732, 742, 748 (6th Cir. 2003), cert. denied, 543 U.S. 1080 (2005), where the Sixth Circuit Court of Appeals held that the pre-trial period counts as a 'critical stage' of trial and that lack of pre-trial consultation between a defendant

and his counsel triggers the *Cronic* presumption.

. . .

Although ***Mitchell*** **is not binding on this Court, that case demonstrates that reasonable jurists may disagree with this Court's analysis of prejudice to Fusi under *Strickland* and its failure to apply the *Cronic* presumption in deciding to dismiss Fusi's petition for a writ of habeas corpus and deny his motion for an evidentiary hearing**. Accordingly, Fusi should be granted a COA. (emphasis added)

Appendix 23-24.

The Judgment Of The Court Of Appeals

The Court of Appeals held that the petition was dismissed without prejudice on two grounds: that petitioner, " . . . failed to fully exhaust his *Cronic* claim before the state court" and had petitioner, " . . . exhausted his *Cronic* claim in state courts, his claim would fail on its merits." In regard to exhaustion, the Court of Appeals found that, "At most, petitioner's state court filings establish the factual predicate for his *Cronic* claim, '(b)ut setting forth the factual underlying interpretations of a claim is insufficient, in and of itself, to constitute fair presentation of that claim. A habeas petitioner must also elucidate the legal foundation of his federal claim," citing, *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). As for

the merits of his *Cronic* claim, the Court of Appeals stated that petitioner, " . . . was not denied counsel either constitutionally or otherwise. The Constitution requires representation of counsel, but does not mandate representation by the equal of Clarence Darrow." The Court also indicated that it was " . . . reluctant to apply *Cronic* broadly." The Court of Appeals found that petitioner was correct in his claim that counsel, "met with Fusi on the day of trial." Appendix A.

In his Petition For Rehearing And Rehearing En Banc, petitioner assented, *inter alia*, that the panel created a constitutional standard, required to demonstrate the ineffective assistance of counsel, which cannot be satisfied and which concomitantly protects "bad lawyering," regardless of how egregious the attorney's lawyering may have been, from judicial review. For, no failures or malfeasance of counsel can satisfy the panel's standard that, "The Constitution requires representation of counsel, but it does not mandate representation by the equal of Clarence Darrow." In addition, " . . . this Circuit's hesitance to apply *Cronic's*, presumption of prejudice to situations of 'bad lawyering,'" " . . . regardless of how bad," and the panel's holding that, " . . . with respect to an incompetent attorney, the attorney's incompetence must rise to a level of a complete denial of counsel," a *Cronic* presumption of prejudice claim, in the First Circuit is virtually non-existent. For, to decline to apply to the *Cronic* presumption to a case where counsel simply appears at trial, did not meet or confer

with the defendant prior to trial, had no knowledge of the case and "shoots from the hip," so that his representation may be characterized as constitutionally excusable "bad lawyering," renders the *Cronic* presumption, not a "narrow exception" to *Strickland* that should be applied "infrequently," but rather, a nullity.

The panel's reference to a lack of entitlement to representation by the equal of Clarence Darrow, combined with its condoning counsel's entry into a case two days prior to trial and doing nothing prior to trial, as sufficient to satisfy the *Strickland* and *Cronic* standards, ignores this Court's decision in *Avery v. State of Alabama*, 308 U.S. 444, 447-452 (1940) and the Third Circuit's decision in *Appel v. Horn*, 250 F.3d 215 (3rd Cir. 2001).

The panel did not recognize that in entering a case two days prior to trial and in not conferring with the defendant prior to trial, it is literally impossible for an attorney in such circumstances, to effectively represent a defendant at trial. By sanctioning such actions, the decision of the panel serves to promote "bad lawyering," rather than to encourage effective representation by counsel in a criminal case.

In regard to the panel's holding that, "Fusi's failure to rely upon *Cronic* in state court is fatal to his habeas petition," petitioner contended that since the panel recognized that *Strickland* was repeatedly cited in the state court proceedings and *Strickland* cites and describes *Cronic*, the citation of a decision which includes and cites to the applicable controlling

decision, is sufficient for exhaustion purposes. *Strickland v. Washington*, 466 U.S. 668, 683 (1984) ("The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. e.g. *United States v. Cronic*, 466 U.S. 648 (1984)").

Despite trial counsel's flagrant deficiencies in the instant case, the decision of the Court of Appeals indicates that by simply being present, the first circumstance that would warrant application of the *Cronic* presumption was satisfied, as there was not a complete denial of counsel at trial. The decision avoids the two other circumstances described by this Court in *Cronic*, that the presumption of prejudice applies to a case, "if counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing" or circumstances such that even a fully competent (attorney) could (not) provide effective assistance of counsel." These circumstances, which in the eyes of this Court require application of the *Cronic* presumption, are precisely the circumstances that existed in the instant case. Whether or not trial counsel, as he contends, but which is questionable, " . . . reviewed the Commonwealth's discovery file, the indictment, the grand jury minutes and the police report," is of no import as counsel did not meet or confer with the man on trial until the very moment that trial began. In effect, counsel represented the petitioner at trial based on the Commonwealth's allegations and

information, to wit, on the Commonwealth's version of the events, as opposed to presenting a defense to the Commonwealth's allegations.

A presumption of prejudice is also supported by the third circumstance described in *Cronic*, that even a fully competent attorney could not provide effective assistance of counsel at trial, in circumstances in which counsel enters a case two days prior to trial and counsel does not meet or confer with the defendant until the day of trial as jury empanelment ensued. An interview of the defendant by counsel for the first and only time on the day of trial, is inherently prejudicial. Such an interview is of no value, especially in a case involving a charge of rape, where the defendant's account of the alleged incident and an investigation predicated on and to support a defendant's account of the incident is essential.

To hold, that trial counsel's representation amounted to constitutionally acceptable bad lawyering and to not apply the *Cronic* presumption to this case, serves to countenance bad lawyering in the future and to decimate a defendant's right guaranteed him by the Sixth Amendment to representation by effective counsel.

REASONS FOR GRANTING THE PETITION

I. GIVEN THE FACT THAT TRIAL COUNSEL WAS ASSIGNED TO REPRESENT PETITIONER TWO DAYS PRIOR TO TRIAL AND DID NOT MEET PETITIONER UNTIL MOMENTS BEFORE JURY EMPANELMENT, SUPPORTS A PRESUMPTION OF PREJUDICE UNDER THE SIXTH AMENDMENT IN EVALUATING A CLAIM OF THE INEFFECTIVENESS OF COUNSEL

Strickland v. Washington, supra, ordinarily applies to claims of ineffective assistance of counsel, in contrast to *United States v. Cronic*, supra, under which prejudice may be presumed. In *Cronic*, the defendant's attorney was appointed twenty-five days before trial on mail fraud charges involving numerous documents. The Court of Appeals reversed the defendant's conviction, concluding that the circumstances had hampered the attorney's preparation of the case and had thus deprived the defendant of the effective assistance of counsel. This Court reversed the Court of Appeals, holding that the case was not one in which the surrounding circumstances made the effective assistance of counsel so unlikely as to warrant a presumption of prejudice. The Court cited *Powell v. Alabama*, 287 U.S. 45 (1932), as a case in which the surrounding circumstances did warrant such a presumption. In *Powell*, defense counsel was afforded a day to prepare for trial, which, as the Court in *Cronic* declared, "made it so unlikely that any lawyer could provide effective assistance and

that ineffectiveness was properly presumed without inquiry into actual performance at trial." *United States v. Cronic*, supra at 661.

"The Supreme Court also recognized in both *Strickland* and *Cronic* that in certain circumstances 'prejudice is presumed' because prejudice 'is so likely that case-by-case inquiry . . . is not worth the cost.'" *James v. Harrison*, 389 F.3d 450, 455 (4th Cir. 2004).

The pre-trial stage of a case, which is the opportunity to adequately prepare a defense, has been clearly delineated as a critical stage of trial, *Powell v. Alabama*, supra at 68-69 ("Left without the aid of counsel [a criminal defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.)" The language in *Powell* was followed by this Court in *Geders v. United States*, 425 U.S. 80, 88 (1976), where the defendant was not permitted to consult with his attorney during an overnight recess in the middle of trial. This Court reversed without conducting a prejudice inquiry, noting that overnight recesses, "are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Id.* at 88.

The fact that a "Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," *McNeil v. Wisconsin*, 501 U.S. 171, 180-181 (1991) was recently reaffirmed by this Court in *Rothgery v. Gillespie County*, 128 S.Ct. 2578 (2008) and supports the pivotal decision upon which the District Court granted a certificate of appealability in the case at bar. *Mitchell v. Mason*, 325 F.3d 732, 741-742 (6th Cir. 2003) (lack of pre-trial investigation and communication with client constituted a "complete denial of counsel at a critical stage of the proceedings." "Because Mitchell was denied the presence of counsel during the critical pre-trial stage, Mitchell's claim should be reviewed under *Cronic*"). Also see, *Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997) ("testimony reflected that appointed counsel in Harris County in the late 1940s routinely failed to discuss strategy with their clients, research the law, investigate the facts, or otherwise go to bat for the accused;" *State v. Savage*, 577 A.2d 455, 120 N.J. 594, 616-617 (N.J. 1990) ("In most instances, a defense attorney who communicates with a defendant only once before a capital trial would warrant the *Cronic* per se analysis. Defense counsel, however, alleges that although he had only one meeting with defendant, he communicated with him at least fifteen to thirty times by telephone. We recognize that it is not the frequency of consultation that reveals whether a defendant has been effectively denied effective legal assistance. Rather, the proper inquiry is whether as a result of that consultation, counsel was able properly to investigate the case and develop a reasonable

defense."). This case does not fall within the factual scenario in which the Court of Appeals for the First Circuit held that a *Cronic* presumption of prejudice did not apply, but recognized that the complete denial of counsel during a critical stage would apply. *United States v. Theodore*, 468 F.3d 52, 55-58 n.2 (1st Cir. 2006) ("Prejudice is also presumed where there is the complete denial of counsel during a critical stage of the prosecution or circumstances surrounding the trial make it impossible for even competent counsel to provide effective representation.")

A grant of certiorari and summary reversal and remand for reconsideration by the Court of Appeals, is necessary in light of *Cronic,* given the complete lack of contact and/or communication with petitioner prior to trial and the total lack of preparation at the critical pre-trial stage of trial, *Mitchell v. Mason*, supra at 741-742, because the Court of Appeals declined to decide petitioner's *Cronic* claim for which a certificate of appealability had been granted. Appendix 1-19.

II. PETITIONER'S PRESENTATION OF THE FACTUAL BASIS OF HIS CLAIM WITH CITATION TO THE SIXTH AND FOURTEENTH AMENDMENTS, EXHAUSTED HIS STATE REMEDIES

A federal court must consider whether a habeas petitioner adequately exhausted state remedies by fairly presenting both the factual and legal premises for his federal claim to the appropriate state courts. See, 28 U.S.C. § 2254(b)(1); *Baldwin v. Reese*, 541 U.S. 27, 30-34 (2004); *Daye v. Attorney General of New York*, 696 F.2d 186, 191-192 (2d Cir. 1982) (en banc). Exhaustion under § 2254 requires only that state prisoners, give state courts a fair opportunity to act on their claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). This requirement is satisfied when a petitioner has presented the substance of his claim to the state courts. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986). "Obviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts." *Daye v. Attorney General of New York*, supra at 192.

In the face of these fundamental principles of exhaustion of state remedies, the Court of Appeals here required something more than the normal means of exhaustion required by this Court in holding that:

> While both *Cronic* and *Strickland* concern Sixth Amendment violations, they are distinct legal claims and the difference between

the two "is not of degree but of kind." *Bell v. Cone*, 535 U.S. 685, 697 (2002). *Strickland* requires a case-by-case analysis of whether counsel's deficiencies affected the outcome of a trial, while *Cronic* permits a presumption of prejudice if an actual or constructive denial of counsel occurs during a critical stage of the trial. These claims, while based on similar factual underpinnings, are separate and distinct. A defendant's reliance on one theory in state court does not exhaust the other. See *Huntley v. McGrath*, 261 F.2d (9th Cir. 2007) (finding *Cronic* claim unexhausted when defendant only raised *Strickland* claim in state courts); *Higgins v. Cain*, No. 09-2330, 2010 WL 1855870, *6-7 (E.D. La. Feb. 8, 2010) (same). . . . At most, Fusi's state court filings establish the factual predicate for his *Cronic* claim, "[b]ut setting forth the factual underpinnings of a claim is insufficient, in and of itself, to constitute fair presentment of that claim. A habeas petitioner must also elucidate the legal foundation of his federal claim." *Fusi v. O'Brien* (Appendix 10-11). The state Appeals Court decision also supports a finding that the factual basis for his federal claim was fairly presented, "The defendant claims, as he has in prior motions, that counsel was inadequately prepared for trial as a result of the relative brevity of the period between counsel's entry into the case and appearance at trial, as well as his failure to interview a potential witness."

Appendix 41.

Contrary to the holding of the Court of Appeals, petitioner exhausted his available state remedies by presenting the factual basis of his claim with clear and unequivocal citation to the Sixth and Fourteenth Amendments in his submissions filed in the state courts.

A grant of certiorari and summarily reversing and a remand for reconsideration by the Court of Appeals, is necessary because, "the Supreme Court also recognized in both *Strickland* and *Cronic* that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry . . . is not worth the cost." *James v. Harrison*, supra at 455, and because petitioner's federal factual and constitutional grounds are sufficiently similar to both *Powell v. Alabama*, supra at 68-69 and *Mitchell v. Mason*, supra at 741-742 and were exhausted in state court.

III. PETITIONER SATISFIED HIS BURDEN OF DEMONSTRATING PREJUDICE IN EVALUATING A CLAIM OF THE INEFFECTIVENESS OF COUNSEL

The Court of Appeals did not decide the issue of prejudice and merely referred to the District Court decision that, "Fusi's allegations do not overcome the deference afforded by [the Antiterrorism and Effective Death Penalty Act] to the state courts' determination that he failed to establish prejudicial ineffective assistance of counsel." Appendix 8.

Petitioner submitted to both the District Court and the Court of Appeals, his assertion that, either as a result of the failure of former counsel to fully present the prejudice created by Chambers' ineffective representation at trial and/or a misconception of the evidence at trial, as well as, the evidence which was not, but should necessarily have been presented at trial, the District Court was not able to, and did not, adequately consider the prejudice to petitioner created by the constitutionally ineffective representation of trial counsel. The prejudice to petitioner included the following:

(a) Attorney Chambers was informed by the assistant district attorney that the Bartolos were not available at the time of trial as they were in Florida during February of 1984. The Bartolos, in fact, were at home, they were not in Florida, they had not been contacted by Chambers and Chambers improperly relied on the misrepresentation to him by the assistant district attorney, which resulted in necessary and critical witnesses not being called to testify.

(b) The Bartolos testified at the evidentiary hearing in 1986, that the only light source on the night of the incident, was a kitchen nightlight inside their home, which was at least seventy (70) feet away from the crime scene.

(c) The Bartolos indicated that Police Officer Annese tried on several occasions to

convince them that they had heard screams on the night of the incident; however, at the evidentiary hearing in 1986, they testified that they had not heard screams.

(d) During the course of her direct testimony, the victim stated that she had "doubt" as to her identification of petitioner as evidenced by the following testimony. The victim testified that petitioner was 60 to 100 pounds heavier at the time of a line-up in November of 1981, than her assailant was on September 12, 1981 and trial counsel failed to elicit or argue that the petitioner could not gain 60 to 100 pounds in the period of about 50 days.

(e) The victim stated that her assailant had olive skin and black hair, whereas, petitioner has white skin and brown hair and trial counsel failed to elicit or argue this point.

(f) The victim stated that the attack occurred under a willow tree at 17 School Street; however, the willow tree is located at 19 School Street and the backyard of 17 School Street did not have a willow tree and trial counsel failed to elicit or argue this point.

(g) The victim's six (6) page statement was discovered by an investigator for petitioner in 2003; the statement was not requested nor otherwise sought by

Chambers and he did not have it at the time of trial and he did not elicit the material discrepancies between the victim's trial testimony and her statement.

(h) The victim's statement would have permitted Chambers to demonstrate that the victim was drinking at three (3) bars during the course of that night and at 3:30 a.m., she could not physically furnish an accurate description of her assailant, whose face was concealed and the area was completely dark with no adequate lighting.

(i) At a line-up procedure in November of 1981, in the courtroom of the Salem District Court, which involved eight (8) Saugus High School football players, who ranged in age from 16 to 17 years, the victim stated, "Do I only get one try."

(j) During the course of the 1986 evidentiary hearing. Chambers was completely untruthful about his preparation and representation of petitioner as he is concomitantly under investigation by the Massachusetts Board of Bar Overseers and that investigation also involved his actions at the time of petitioner's trial.

(k) The boyfriend of the victim informed the prosecuting assistant district attorney, that the victim called him six (6) hours after the incident and stated that her assailant raped her at knifepoint, whereas, at trial, there was no mention

of a weapon. This fact was elicited in the 1986 evidentiary hearing. Wallace was included on the Commonwealth's list of witnesses, but was informed by the assistant district attorney, that he was not needed and to leave and Chambers did not attempt to or produce this critical testimony at trial.

(l) There was no medical or physical evidence of any nature produced at trial, including any medical information supporting the victim's allegations of rape and Chambers failed to elicit or argue this point.

The Massachusetts Appeals Court failed to address almost all of the foregoing areas of potential prejudice and disregarded Chambers' failure to have petitioner testify to his actual innocence, as the Court held:

> The defendant points to two differences between trial counsel's 1986 testimony and his current affidavit as evidence of untruthful testimony. First, the defendant contrasts trial counsel's 1986 testimony that he was unable to recall exactly how long before trial he received the defendant's case with his current assertion that he received the case two days prior to trial. Second, the defendant distinguishes between trial counsel's 1986 testimony that he visited the crime scene several times and attempted to speak with the Bartolos while there, and his most current affidavit, which mentions only that he

> visited the crime scene. These minor differences appear more a clarification of trial counsel's prior vagueness than a revelation of intentional subterfuge. We are inclined to agree with the motion judge who remarked that '[the] defendant may have alleged some inconsequential new fact, but the essence of his arguments are the same as those he has brought previously.' The new evidence proffered falls short of materiality and lends no 'measure of strength' to the defendant's arguments. More importantly, the defendant has offered no evidence to contradict the trial judge's finding that 'it does not appear that the Bartolos' testimony would have 'accomplished something material' for defendant.
>
> Appendix 42-43.

Neither of the decisions of the state courts on petitioner's various motions for new trial, or on appellate review, considered the presumption of prejudice standard required by *United States v. Cronic*, supra, nor did the state court decisions refer to this Court's holding in *Cronic*. In addition, the factual findings of the state courts concerning the second prong prejudice analysis required by *Strickland v. Washington*, supra, misapplied the facts to the required federal prejudice standard.

A federal court may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme

Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d) The statutory phrase "clearly established federal law," "refers to the holdings, as opposed to the dicta, of [the U.S. Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). As an illustration of the rare case where a presumption of prejudice applies because of a lack of preparation time, the Supreme Court in *Cronic* pointed to *Powell v. Alabama*, supra at 53, where defense counsel was appointed to represent the defendant on the day of trial and was denied an opportunity to prepare the case. *United States v. Cronic*, supra at 660.

The instant case is identical to the situation in *Powell v. Alabama*, supra; however, the similarity and the ramifications of the similarity were not recognized by the state courts, which satisfies the requirement of petitioner having to show that the state court decisions were contrary to controlling federal law. See on point, *Mitchell v. Mason*, 257 F.3d 554, 574 (6th Cir. 2001) and *Mitchell v. Mason*, 325 F.3d 732, 748 (6th Cir. 2003).

Certiorari must be granted given the failure of the state courts to consider the totality of evidence supporting a finding of prejudice, which was contrary to and an unreasonable application of, *Strickland v. Washington*, supra, as well as, *United States v. Cronic*, supra.

CONCLUSION

For the foregoing reasons and because in situations in which counsel meets a defendant moments before trial commences and/or fails to conduct an investigation of any nature prior to trial, create a presumption that the defendant's right to the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States is violated and that in such a situation, a defendant need not show prejudice in order to prevail and that such a finding of presumption applies to petitioner's case, a writ of certiorari should be granted. Indeed, so clear is the error of the Court of Appeals, that petitioner respectfully asserts that appropriate relief would be the summary reversal of the decision of that Court. Such relief is consistent with this Court's practice in cases not only where the law is well settled by a prior decision, but also in cases where the action of the lower court is clearly improper, as here, in light of *Strickland v. Washington*, supra and *United States v. Cronic*, supra.

Respectfully submitted,

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Dated: March 7, 2011

United States Court of Appeals
For the First Circuit

No. 09-1060

ALFRED P. FUSI,

Petitioner, Appellant,

v.

STEVEN O'BRIEN,

Respondent, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel J. Gorton, *U.S. District Judge*]

Before

Boudin, Selya, and Gajarsa, *Circuit Judges*.
Of the Federal Circuit, sitting by designation.

Bernard Grossberg for appellant.

Jessica V. Barnett, Assistant Attorney General, Criminal Bureau, Appeals Division, with whom Martha Coakley, Attorney General, was on brief, for appellee.

September 16, 2010

GAJARSA, *Circuit Judge*. Petitioner Alfred Fusi ("Fusi") appeals from the United States District Court for the District of Massachusetts' denial of his

petition for a writ of habeas corpus and request for an evidentiary hearing. *See Fusi* v. *O'Brien,* 588 F. Supp. 2d 158 (D. Mass. 2008). In his habeas petition, Fusi alleged that he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to prepare for trial. Because Fusi failed to exhaust his ineffective assistance of counsel claim in state court, the district court should have dismissed his petition without prejudice.

I.

On February 17, 1984, Fusi was convicted in Essex County Superior Court of rape in violation of chapter 265, section 22B of Massachusetts General Laws. Fusi was sentenced to a prison term of fifteen to twenty years. Fusi's sentence was to begin after he finished serving time for a previous conviction.

The district court cogently and aptly described the circumstances surrounding Fusi's conviction and the performance of his initial trial counsel, Richard Chambers, as follows:

> Fusi's prosecution arose out of an incident that occurred on the evening of September 11, 1981, The alleged rape victim in the case described how she had gone out to two bars and consumed five drinks during the evening. At about 2:00 a.m., the victim had an argument with her boyfriend and decided to take a walk. While walking, she passed a man (18 to 20 years old) who said "Hi" as she passed him. When she said "Hi" in response,

he hit her in the jaw, knocking her temporarily unconscious. She regained consciousness in a backyard where her assailant was kneeling on top of her, illuminated from some light source. She screamed but the man told her he would kill her if she did not stop screaming and stuffed a bandana into her mouth. He proceeded to rape her and then immediately left the area.

The victim walked out to a road where after a short time, she saw a friend driving by. The friend stopped and took her to the police station. Although the victim reported the assault, she did not make a written statement about the rape at that time because she felt "out of it" and wanted to go to the hospital to obtain treatment for her jaw.

The following day, the victim leafed through a local high school yearbook to try to give her friends an idea of what her assailant looked like. She did not notice that Fusi's photograph appeared in the yearbook four times. Six days later, the victim returned to the police station where the police arrayed seven photographs of men matching her description of the assailant. In less than one minute, she picked out Fusi as "the man that raped me". [sic] She also positively identified him after looking at the photographs a second time. At that time the victim provided the police with a six-page written statement describing the rape. Approximately one month later, the victim returned to the police station again and picked Fusi out from a

nine-man line-up in less than one minute. The victim also positively identified Fusi as her rapist at his trial.

The strategy Atty. Chambers chose to adopt at Fusi's trial was one of mis-identification and alibi. To that end, he cross-examined the Commonwealth's witnesses, including the victim at length, focusing on the victim's lack of opportunity to see her assailant and on discrepancies in her description of him as compared with his actual appearance, such as 1) her failure to describe a birth-mark Fusi bears on his cheek, 2) her description of him as olive-skinned and Italian-looking (whereas he was very pale-skinned) and 3) her statement that the assailant weighed considerably less than Fusi actually weighed.

Atty. Chambers called several witnesses to testify about Fusi's appearance. He also called Fusi's girlfriend of six years and a friend of Fusi's to testify that on the evening in question they were "hanging out" at Fusi's home. Fusi's girlfriend testified that Fusi drove her home about 1:30 a.m. Fusi's mother testified that she was still awake when Fusi returned home about half an hour later. She also testified that she went to bed around 2:20 a.m. and did not hear anyone leave the house for the rest of the night. At the conclusion of the trial, the judge, addressing Atty. Chambers, stated, "I appreciate you worked hard". [sic] Atty. Chambers did not, however, become aware of or cross-examine the victim with respect to her

> six-page, written statement describing the rape even though that statement was available for use at trial and was inconsistent with the victim's testimony in several ways.

Fusi, 588 F. Supp. 2d at 160-61.

At the conclusion of the initial trial, an Essex County jury found Fusi guilty of rape and his conviction was subsequently affirmed by the state appellate courts. Fusi then filed his first motion for post-conviction relief on April 18, 1984. Fusi's motion alleged that the jury improperly considered his failure to testify at trial as evidence of guilt. Atty. Chambers represented Fusi during this first motion. The motion was denied after a non-evidentiary hearing.

Fusi, with the assistance of new counsel, then filed a second motion for post-conviction relief on December 12, 1985. Fusi's new counsel argued that Fusi was entitled to a new trial on several grounds, including ineffective assistance of counsel. Specifically, Fusi alleged that Atty. Chambers provided ineffective assistance of counsel by, *inter alia,* failing to interview and call prospective witnesses. An evidentiary hearing was held and the motion was denied. Fusi appealed, but narrowed his allegations of error and no longer argued that Atty. Chambers provided ineffective assistance of counsel. The Massachusetts Appeals Court subsequently affirmed the trial court's denial. *See Commonwealth* v. *Fusi,* 517 N.E. 2d 1303 (1988) (Table). Fusi appealed to the Supreme Judicial Court ("SJC"), which denied leave to purse further

appellate review. *See Commonwealth* v. *Fusi,* 519 N.E. 2d 1348 (1988) (Table).

Fusi then filed a third motion for post-conviction relief on June 1, 1989. The third motion argued that the grand jury process had been impaired and that Atty. Chambers' failure to object to the grand jury process constituted ineffective assistance of counsel. Following a non-evidentiary hearing, the trial court denied the motion. Fusi appealed and his appeal was denied by the Massachusetts Appeals Court and the SJC. *See Commonwealth* v. *Fusi,* 553 N.E. 2d 560 (1990) (Table); *Commonwealth* v. *Fusi,* 554 N.E. 2d 1214 (1990) (Table).

Fusi's fourth motion for post-conviction relief was filed on November 17, 1995. In the fourth motion, Fusi again alleged that Atty. Chambers provided ineffective assistance of counsel, this time due to his failure to object to alleged sentencing errors. After a non-evidentiary hearing, the trial court denied Fusi's request for a new trial, but ordered a new sentencing hearing due to Atty. Chambers' failure to adequately represent Fusi during sentencing. Following the new sentencing hearing, the trial court reimposed the original sentence. Fusi appealed, but the appeal was dismissed for failure to prosecute.

On March 3, 2003, Fusi filed his fifth motion for post-conviction relief asserting several grounds, including ineffective assistance of counsel. With his motion, Fusi provided the trial court with an affidavit from now-disbarred Atty. Chambers in which Atty. Chambers

admitted that (1) he received Fusi's case two days prior to trial and (2) he visited the crime scene, but never spoke with Leonard and Cathleen Bartolo, whose backyard was the crime scene and who Fusi stated would contradict some of the victim's testimony concerning the light in the Bartolos's backyard and whether she screamed on the night of the rape. Relying on Atty. Chambers' affidavit and affidavits from his mother and sister, Fusi argued that he was deprived of his Sixth Amendment right to the effective assistance of counsel because Atty. Chambers did not adequately prepare for trial.

The trial court denied Fusi's motion. Fusi appealed to the Massachusetts Appeals Court, which found no "manifest injustice" and affirmed the trial court's ruling. *Fusi* v. *Commonwealth,* 854 N.E. 2d 1266, *1-2 (2006) (Table). The SJC subsequently denied Fusi's Application for Leave to Obtain Further Appellate Review ("ALOFAR"). *Commonwealth* v. *Fusi,* 857 N.E. 2d 1094 (2006) (Table).

Fusi continued his quest for a constitutional remedy by filing a habeas petition in federal district court. To support his habeas petition, Fusi requested an evidentiary hearing. In the motion for an evidentiary hearing, Fusi argued that because Atty. Chambers completely failed to prepare for trial a presumption of prejudicial ineffective assistance of counsel was warranted.

After hearing oral arguments on the motion, the district court issued an order denying both the

request for an evidentiary hearing and the habeas petition. *Fusi,* 588 F. Supp. 2d at 165-66. The district court implicitly denied Fusi's request for a presumption of prejudice and held that Fusi's allegations, even if accepted as true, created at best a "close call" on the issue of prejudice. *Id.* The district court then held that Fusi's allegations "do not overcome the deference afforded by [the Antiterrorism and Effective Death Penalty Act] to the state courts' determination that he failed to establish prejudicial ineffective assistance of counsel." *Id.* at 166. Accordingly, Fusi was not entitled to either an evidentiary hearing or a writ of habeas corpus. *Id.*

In response, Fusi applied for a Certificate of Appealability. In the application, Fusi, relying primarily on the Sixth Circuit's decision in *Mitchell* v. *Mason,* 325 F.3d 723 (6th Cir. 2003), again asserted that he was entitled to a presumption of prejudicial ineffective assistance of counsel because of Atty. Chambers' alleged failure to prepare for trial. The district court granted the Certificate of Appealability, *Fusi* v. *O'Brien,* 626 F. Supp. 2d 135 (D. Mass. 2009), and this appeal followed.

II.

The critical issue on appeal is whether Fusi fully exhausted his ineffective assistance of counsel claim in state court. In order to promote principles of comity and federalism, "a federal court will not entertain an application for habeas relief unless the petitioner first

has fully exhausted his state remedies in respect to each and every claim contained within the application." *Adelson* v. *DiPaola,* 131 F.3d 259, 261 (1st Cir. 1997). The doctrine of exhaustion traces its origins to the 19th century, *Ex parte Royall,* 117 U.S. 241, 251 (1886), and was codified by Congress in 1948, 62 Stat. 967.

The Supreme Court has explicated that "[t]he exhaustion doctrine is principally designed to protect the state courts role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose* v. *Lundy,* 455 U.S. 509, 518 (1982). Given their co-equal status in our federal structure, the doctrine ensures that state courts are afforded an adequate opportunity to adjudicate constitutional claims properly within their jurisdiction. *See Darr* v. *Burford,* 339 U.S. 200, 204 (1950). The doctrine also finds support in a "pragmatic recognition that 'federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.'" *Castille* v. *Peoples,* 489 U.S. 346, 349 (1989) (quoting *Rose,* 455 U.S. at 519).

In the First Circuit, "a habeas petitioner bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim." *Adelson,* 131 F.3d at 261 (alterations added); *Scarpa* v. *Dubois,* 38 F.3d 1, 6 (1st Cir. 1994). The petitioner's ALOFAR is the "decisive pleading" and the federal claim must be presented to the state's highest court within the four corners of the

ALOFAR. *Adelson,* 131 F.3d at 263; *Mele* v. *Fitchburg Dist. Court,* 850 F.2d 817, 823 (1st Cir. 1988). Earlier state court filings, however, provide a "backdrop" against which the ALOFAR can be read if it is ambiguous. *See Clements* v. *Maloney,* 485 F.3d 158, 163-64 (1st Cir. 2007).

Before the district court, Fusi argued that he was entitled to a writ of habeas corpus because he was denied the effective assistance of counsel in violation of the Sixth Amendment. In *Strickland* v. *Washington,* 466 U.S. 668 (1984), the Supreme Court established the standard test for determining whether a defendant's Sixth Amendment right to counsel was violated. Under the *Strickland* test, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. On the same day that *Strickland* was issued, the Supreme Court issued *United States* v. *Cronic,* 466 U.S. 648 (1984), another case concerning the scope of the Sixth Amendment's right to counsel. In *Cronic,* the Supreme Court held that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. In these limited circumstances, prejudice is presumed "without inquiry into counsel's actual performance at trial." Id. at 662.

While both *Cronic* and *Strickland* concern Sixth Amendment violations, they are distinct legal claims

and the difference between the two "is not of degree but of kind." *Bell* v. *Cone,* 535 U.S. 685, 697 (2002). *Strickland* requires a case-by-case analysis of whether counsel's deficiencies affected the outcome of a trial, while *Cronic* permits a presumption of prejudice if an actual or constructive denial of counsel occurs during a critical stage of the trial. These claims, while based on similar factual underpinnings, are separate and distinct. A defendant's reliance on one theory in state court does not exhaust the other. *See Huntley* v. *McGrath,* 261 F. App'x. 4, 6 (9th Cir. 2007) (finding *Cronic* claim unexhausted when defendant only raised *Strickland* claim in state courts); *Higgins* v. *Cain,* No. 09-2330, 2010 WL 1855870, *6-7 (E.D. La. Feb. 8, 2010) (same).

In his habeas petition, Fusi argued that a *Cronic* presumption of prejudice was warranted because Atty. Chambers' failure to prepare adequately for trial effectively denied Fusi any counsel during the critical, pre-trial stage of the criminal proceeding. *See Cronic,* 466 U.S. at 659 (identifying the "complete denial of counsel" as a circumstance warranting the presumption of prejudice). For support, Fusi relied primarily on *Mitchell* v. *Mason,* a case in which the Sixth Circuit held that an attorney's complete failure to prepare for trial should be analyzed under *Cronic,* not *Strickland. See Mitchell,* 325 F.3d at 748.

The relevant question on appeal is whether Fusi presented to the SJC his argument that *Cronic,* not *Strickland,* applies to his claim of ineffective assistance of counsel. A close examination of Fusi's

ALOFAR reveals not a single citation to *Cronic* or the Sixth Circuit's decision in *Mitchell* v. *Mason*. Instead, the ALOFAR relies exclusively upon the standard two-prong *Strickland* test, specifically citing that Supreme Court case five times. Instead of arguing for a presumption of prejudice, the ALOFAR argues at length that Atty. Chambers' deficient assistance caused actual prejudice. At no point does the ALOFAR argue or even imply that Fusi was entitled to a presumption of prejudice. Accordingly, the "decisive pleading" in this appeal establishes that Fusi did not raise his *Cronic* claim in state court.

Moreover, Fusi's previous state court filings also did not raise his *Cronic* claim. In his brief to the Massachusetts Appeals Court, Fusi relied exclusively on *Strickland's* two-prong test. Indeed, the brief specifically mentions *Strickland's* prejudice prong and argues that Atty. Chambers caused actual prejudice. Additionally, in his initial brief to the trial court, Fusi again relied exclusively on *Strickland,* quoted the case at length throughout the brief, and argued that Atty. Chambers caused actual prejudice. While we find no ambiguity in the ALOFAR, to the extent any did exist, the backdrop against which we read the ALOFAR bolsters our conclusion that Fusi did not raise his *Cronic* claim in state court.

At most, Fusi's state court filings establish the factual predicate for his *Cronic* claim, "[b]ut setting forth the factual underpinnings of a claim is insufficient, in and of itself, to constitute fair presentment of that claim. A habeas petitioner must also elucidate the

legal foundation of his federal claim." *Adelson,* 131 F.3d at 262. Fusi failed to elucidate any legal foundation for his *Cronic* claim in state court.

For the foregoing reasons, Fusi failed to exhaust fully his *Cronic* claim before the state court. Thus, the district court should have dismissed his petition for a writ of habeas corpus without prejudice.

III.

Fusi's failure to rely upon *Cronic* in state court is fatal to his habeas petition. Had Fusi exhausted his claim, however, he would still face a rocky slope on his constitutionally premised appeal given this circuit's hesitance to apply *Cronic's* presumption of prejudice to situations of "bad lawyering." *See, e.g., United States* v. *Theodore,* 468 F.3d 52, 56-58 (1st Cir. 2006); *Scarpa,* 38 F.3d at 13. This circuit has made clear that "seldom [do] circumstances arise that justify a court in presuming prejudice (and, concomitantly, in forgoing particularized inquiry into whether a denial of counsel undermined the reliability of a judgment)." *Ellis* v. *United States,* 313 F.3d 636, 643 (1st Cir. 2002). With respect to an incompetent attorney, the attorney's incompetence must rise to the level of a complete denial of counsel; "bad lawyering, regardless of how bad" is insufficient. *Scarpa,* 38 F.3d at 13 (quoting *McInerney* v. *Puckett,* 919 F.2d 350, 352-53 (5th Cir. 1990)).

Supreme Court precedent dictates our narrow application of the *Cronic* presumption of prejudice. In

Cronic, the Court identified three specific circumstances that warranted the presumption. *See* 466 U.S. at 659-662. The first and "most obvious" is a "complete denial of counsel . . . at a critical stage." *Id.* at 659. The second occurs "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.* And, the third occurs when the circumstances are such that "even a fully competent [attorney], could [not] provide effective assistance of counsel." *Id.* at 659-60. Circumstances falling into the third category include the appointment of counsel "so close upon trial as to amount to a denial of effective and substantial aid." *Id.* at 660 (quoting *Powell* v. *Alabama,* 287 U.S. 45, 53 (1932)).

Turning to the merits of Cronic's petition, the Court held that the circumstances surrounding his conviction did not warrant a presumption of prejudice. *Id.* at 666. The Court refused to presume prejudice despite the fact that the charged offense was a complicated mail fraud scheme and the defense attorney was appointed twenty-five days prior to trial, had no criminal law experience, and never tried a jury case before. *Id.* According to the Court, these facts "are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for" presuming prejudice. *Id.* at 663.

Since issuing *Cronic,* the Supreme Court has consistently declined invitations to interpret the case expansively. In *Bell* v. *Cone,* the defense attorney, during sentencing in a capital case, established that

the defendant was a war veteran who received the Bronze Star and potentially suffered from Vietnam Veterans Syndrome. *See* 535 U.S. at 691-92. The defense attorney also successfully objected to the introduction of the victims' photographs, but "he did not interview witnesses aside from those relevant to the guilt phase; he did not present testimony relevant to mitigation from the witnesses who were available; and he made no plea for [the defendant's] life or closing remarks after the State's." *Id.* at 708 (Stevens, J., dissenting). Despite these failings, the Court held that the defendant was not entitled to a presumption of prejudice because the attorney did not entirely fail to subject the prosecution's case to adversarial testing. *See id.* at 697 (majority op.).

Two years later, in *Florida* v. *Nixon*, 543 U.S. 175, 178 (2004), the Supreme Court again refused to presume prejudice. This time the defense counsel conceded the defendant's guilt during trial without the defendant's express consent. In holding that such conduct did not warrant a presumption of prejudice, the Court described *Cronic* as a "narrow exception" to *Strickland* that should be applied "infrequently." *Id.* at 190.

Following the Supreme Court's instructions, this circuit has been reluctant to apply *Cronic* broadly. Importantly, we have not presumed prejudice in situations strikingly similar to the one before us today. For example, in *Scarpa*, we considered whether to apply the *Cronic* presumption to a situation where the defense attorney did not attempt to impeach government witnesses, effectively conceded the

disputed elements of the charged crimes, and whose closing argument solicited the jury to accept the government's testimony. 38 F.3d at 9-11. We described the defense attorney's legal theory as "half-baked" and his blunders as "not only fail[ing] to assist in fashioning a defense but also cement[ing] the prosecution's theory of the case." *Id.* at 10-11.We therefore concluded that the defense attorney's conduct fell below an objective standard of reasonableness. *Id.* at 11.

We did not, however, hold that defense counsel's ineptitude warranted a presumption of prejudice. Instead, we recognized that *Cronic* is a narrow exception to *Strickland's* rule and should only apply to conduct "so antithetic to effective assistance . . . that a case-by-case analysis simply is not worth the cost of protracted litigation." *Id.* at 12. We also explained that "attorney error, even when egregious, will almost always require analysis under *Strickland's* prejudice prong." *Id.* at 14, "Put bluntly, because [defense counsel's] errors are more an example of maladroit performance than of nonperformance, *Strickland* necessitates an inquiry into the existence of actual prejudice." *Id.* at 15.

More recently, in *Theodore* we were asked to apply the *Cronic* presumption to trial counsel's incompetent pre-trial investigation. In *Theodore,* we recognized that trial counsel's pre-trial investigation was "incomplete." 468 F.3d at 55. While trial counsel reviewed some documents, he wholly ignored several CD ROMs that contained all of the government's

evidence. *Id.* Trial counsel also failed to interview any witnesses beyond the defendant and openly stated that he planed "to play it by ear and shoot from the hip." *Id.*

Despite trial counsel's woefully inadequate preparation, we refused to presume prejudice because while the "representation of [the defendant] suffered significant shortcomings, it was not tantamount to non-representation." *Id.* at 57. Trial counsel reviewed boxes of documents, requested copies of relevant documents from the government, filed pretrial motions, and exercised several peremptory challenges. *Id.* at 57. During trial, counsel cross-examined government witnesses, suggested defense themes, and introduced exhibits. *Id.* at 57. This conduct, while still below an objective level of reasonableness, "was not so deficient that [the defendant] should have been relieved from demonstrating prejudice under *Strickland.*" *Id.* at 57-58.

Like the attorneys in *Scarpa* and *Theodore,* Atty. Chambers' performance may have fallen below an objective standard of reasonableness, but was not of the character as to constitute constructive denial of counsel "justify[ing] a presumption that [the defendant's] conviction was insufficiently reliable to satisfy the Constitution." *Cronic,* 466 U.S. at 662. In the affidavit that Fusi submitted with his habeas petition, Atty. Chambers stated that prior to trial he reviewed the Commonwealth's discovery file, the indictment, the grand jury minutes, and the police report. Atty. Chambers also stated that he interviewed

Fusi's sister and mother prior to trial, interviewed Fusi on the day of trial, and visited the crime scene. Although Atty. Chambers received the case only two days prior to trial and admitted he would be "shooting from the hip," he provided Fusi with some, albeit limited, representation thereby precluding a presumption of prejudice under *Cronic*. Fusi may have retained a bad lawyer; he was not, however, denied counsel.

We take no view as to whether *Mitchell* v. *Mason* was correctly decided. We do note, however, that the Sixth Circuit opinion does not dissuade us from our present conclusion. In *Mitchell,* the defense counsel in a capital case met with the defendant for only six minutes spread over three meetings prior to trial, failed to contact or interview known material witnesses, ignored the defendant's repeated requests for consultation, and was suspended from the practice of law for the thirty days preceding trial. *Id.* at 744-47. The Sixth Circuit concluded that the defense counsel was "utterly absent" during the pre-trial stages of the criminal proceeding and held that *Cronic,* rather than *Strickland,* should apply to the defendant's ineffective assistance of counsel claim. *Id.* at 748.

In this case, unlike in *Mitchell,* there is evidence that Atty. Chambers performed something more than a minim of work during the pre-trial phase. As noted above, he reviewed the Commonwealth's evidence, the indictment, the grand jury minutes, and the police report; he visited the crime scene; he met with Fusi's sister and mother; and he met with Fusi on the

day of trial. These facts distinguish this case from *Mitchell* in which the defense attorney did nothing prior to trial and was not licensed to practice law the entire month preceding trial. Unfortunately for Fusi, he was not denied counsel, either constructively or otherwise. The Constitution requires representation of counsel, but it does not mandate representation by the equal of Clarence Darrow.

Accordingly, had Fusi exhausted his *Cronic* claim in the state courts, his claim would fail on its merits.

IV.

For the foregoing reasons, we VACATE and REMAND with instructions to dismiss Fusi's petition for a writ of habeas corpus without prejudice. Each party to bear their own costs.

United States District Court
District of Massachusetts

ALFRED FUSI, **Plaintiff,** **v.** **STEVE O'BRIEN, IN HIS CAPACITY AS SUPERINTENDENT OF THE MASSACHUSETTS DEPARTMENT OF CORRECTION,** **Defendant.**	**Civil Action No. 07-10940-NMG**

MEMORANDUM & ORDER

(Filed Jun. 10, 2009)

GORTON, J.

The petitioner, Alfred Fusi ("Fusi"), is currently serving a criminal sentence after being convicted of rape in violation of M.G.L. ch. 265, § 22B, in Essex County Superior Court in February, 1984. After this Court denied his petition for habeas corpus and a related motion for an evidentiary hearing, he has moved for the issuance of a certificate of appealability ("COA").

I. Background

For a detailed description of the facts underlying this case, see this Court's Memorandum and Order denying Fusi's petition and motion for a hearing, *Fusi v. O'Brien,* 588 F. Supp. 2d 158 (D. Mass. 2008).

The Massachusetts Court of Appeals affirmed Fusi's conviction in the trial court and the Supreme Judicial Court ("the SJC") denied any further appellate review. Over the course of almost 20 years following his conviction, Fusi filed five motions for a new trial alleging, *inter alia,* ineffective assistance of his trial counsel, Richard Chambers ("Atty. Chambers"), in violation of the Sixth Amendment of the Constitution. All of those motions were denied.

In May, 2007, Fusi filed a petition for federal habeas corpus relief based on the denial of his fifth motion for a new trial. In support of his petition, he alleged that Atty. Chambers 1) was assigned to the case only two days before jury empanelment by the lawyer Fusi had originally retained; 2) did not confer with Fusi until the first day of trial; 3) failed to conduct any investigation of the case other than visiting the crime scene, interviewing Fusi's mother and sister and reviewing the police reports and grand jury minutes, 4) failed to obtain and/or refer to a six-page statement which the victim gave to the police containing details inconsistent with her testimony at trial and 5) did not attempt to contact Leonard and Catherine Bartolo ("the Bartolos") who owned the residence behind which the victim was allegedly

raped and who would have offered testimony in conflict with that of the victim with respect to the source of light in their backyard and whether she screamed on the night of the alleged rape.

In considering his motion for an evidentiary hearing, the Court took Fusi's factual allegations as true and considered whether they would entitle him to federal habeas relief under 28 U.S.C. § 2254(d)(1) which is available when a state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law." It determined that the Massachusetts courts' denial of Fusi's motion for a new trial did not satisfy the § 2254(d)(1) standard because, under the relevant federal law set forth in *Strickland* v. *Washington,* 466 U.S. 668, 687 (1984), whether Fusi had been prejudiced by Atty. Chambers' shortcomings, and thus whether his Sixth Amendment right had been violated, was at best only a "close call." Hence, the state courts did not appear unreasonable in finding no Sixth Amendment violation. In response to the Court's decision, Fusi filed the pending application for a COA.

II. Legal Analysis

A. Legal Standard

Pursuant to 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." In deciding upon an application for a COA, a district judge must state which issues, if

any, satisfy the standard set forth in § 2253(c)(2) or the reasons for denying the application. 1st Cir. Loc. R. 22.1(a).

The exact standard for issuance of a COA depends upon whether the petition for which appeal is sought was denied upon substantive or procedural grounds. See *Slack* v. *McDaniel,* 529 U.S. 473, 484 (2000). Because Fusi's petition for habeas corpus was denied on the merits, this Court may issue a COA if "the petitioner . . . demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

B. Application

The Supreme Court has recognized that "complete denial of counsel" at a "critical stage" of trial creates a presumption that the trial was so unfair as to violate the defendant's Sixth Amendment right to effective assistance of counsel. See *Bell* v. *Cone,* 535 U.S. 685, 695-96 (2002), citing *United States* v. *Cronic,* 466 U.S. 648 (1984). That presumption is based on the notion that certain circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic,* 466 U.S. at 658.

Fusi argues that a COA is warranted in his case because the Court failed to apply such a presumption arising from Atty. Chambers' ineffective assistance and, in particular, his failure to confer with Fusi before trial. In support of that contention, Fusi cites

Mitchell v. *Mason,* 325 F.3d 732, 742, 748 (6th Cir. 2003), *cert. denied,* 543 U.S. 1080 (2005), where the Sixth Circuit Court of Appeals held that the pre-trial period counts as a "critical stage" of trial and that lack of pre-trial consultation between a defendant and his counsel triggers the *Cronic* presumption. The circuit court also held that the Michigan Supreme Court had erred in applying the standard set forth in *Strickland* rather than *Cronic*. *Mitchell,* 325 F.3d at 748.

Although *Mitchell* is not binding on this Court, that case demonstrates that reasonable jurists may disagree with this Court's analysis of prejudice to Fusi under *Strickland* and its failure to apply the *Cronic* presumption in deciding to dismiss Fusi's petition for a writ of habeas corpus and deny his motion for an evidentiary hearing. Accordingly, Fusi should be granted a COA.

ORDER

In accordance with the foregoing, Fusi's motion for a certificate of appealability (Docket No. 34) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated June 10, 2009

United States District Court
District of Massachusetts

ALFRED FUSI,	
Plaintiff,	
v.	**Civil Action No. 07-10940-NMG**
STEVE O'BRIEN, IN HIS CAPACITY AS SUPERINTENDENT OF THE MASSACHUSETTS DEPARTMENT OF CORRECTION,	
Defendant.	

MEMORANDUM & ORDER

(Filed Dec. 5, 2008)

GORTON, J.

In February, 1984, a jury in Essex County Superior Court convicted the petitioner, Alfred Fusi ("Fusi"), of rape in violation of M.G.L. ch. 265, § 22B. While on trial, Fusi was represented by Attorney Richard Chambers ("Atty. Chambers"). Fusi has since filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 claiming ineffective assistance of counsel based on Atty. Chambers' performance at trial. Fusi has also filed a related motion for an evidentiary hearing.

I. Background

A. Factual Background

Fusi's prosecution arose out of an incident that occurred on the evening of September 11, 1981. The alleged rape victim in the case described how she had gone out to two bars and consumed five drinks during the evening. At about 2:00 a.m., the victim had an argument with her boyfriend and decided to take a walk. While walking, she passed a man (18 to 20 years old) who said "Hi" as she passed him. When she said "Hi" in response, he hit her in the jaw, knocking her temporarily unconscious. She regained consciousness in a backyard where her assailant was kneeling on top of her, illuminated from some light source. She screamed but the man told her he would kill her if she did not stop screaming and stuffed a bandana into her mouth. He proceeded to rape her and then immediately left the area.

The victim walked out to a road where after a short time, she saw a friend driving by. The friend stopped and took her to the police station. Although the victim reported the assault, she did not make a written statement about the rape at that time because she felt "out of it" and wanted to go to the hospital to obtain treatment for her jaw.

The following day, the victim leafed through a local high school yearbook to try to give her friends an idea of what her assailant looked like. She did not notice that Fusi's photograph appeared in the yearbook four times. Six days later, the victim returned to

the police station where the police arrayed seven photographs of men matching her description of the assailant. In less than one minute, she picked out Fusi as "the man that raped me". She also positively identified him after looking at the photographs a second time. At that time the victim provided the police with a six-page written statement describing the rape. Approximately one month later, the victim returned to the police station again and picked Fusi out from a nine-man line-up in less than one minute. The victim also positively identified Fusi as her rapist at his trial.

The strategy Atty. Chambers chose to adopt at Fusi's trial was one of misidentification and alibi. To that end, he cross-examined the Commonwealth's witnesses, including the victim at length, focusing on the victim's lack of opportunity to see her assailant and on discrepancies in her description of him as compared with his actual appearance, such as 1) her failure to describe a birth-mark Fusi bears on his cheek, 2) her description of him as olive-skinned and Italian-looking (whereas he was very pale-skinned) and 3) her statement that the assailant weighed considerably less than Fusi actually weighed.

Atty. Chambers called several witnesses to testify about Fusi's appearance. He also called Fusi's girl-friend of six years and a friend of Fusi's to testify that on the evening in question they were "hanging out" at Fusi's home. Fusi's girlfriend testified that Fusi drove her home about 1:30 a.m. Fusi's mother testified that she was still awake when Fusi returned home about

half an hour later. She also testified that she went to bed around 2:20 a.m. and did not hear anyone leave the house for the rest of the night. At the conclusion of the trial, the judge, addressing Atty. Chambers, stated, "I appreciate you worked hard". Atty. Chambers did not, however, become aware of or cross-examine the victim with respect to her six-page, written statement describing the rape even though that statement was available for use at trial and was inconsistent with the victim's testimony in several ways.

B. Procedural History

The Massachusetts Court of Appeals affirmed the judgment of the trial court and the Supreme Judicial Court ("the SJC") denied any further appellate review.

Over the course of almost 20 years following his conviction, Fusi filed five motions for a new trial, all of which were denied. Fusi alleged, *inter alia,* ineffective assistance of counsel based upon Atty. Chambers' alleged failure to prepare adequately for trial or to interview potential witnesses in support of his second and fifth motions. Fusi also alleged ineffective assistance of counsel for Chambers' failure 1) to move to dismiss the indictment in support of Fusi's third motion, 2) to request a jury instruction on "good faith error" with respect to the victim's identifications and 3) to represent Fusi adequately during sentencing, in support of his fourth motion.

Evidentiary hearings were held in connection with the second and fourth motions. Fusi requested an evidentiary hearing on the fifth motion but Justice Robert H. Bohn of the Massachusetts Superior Court denied that request because he found Fusi's

> eight affidavits, hundreds of pages of trial and motion transcripts, and various materials dealing with discipline of his trial counsel for unrelated matters

to be sufficient for determination of the issues. *Commonwealth* v. *Fusi,* No. 1981-03626, slip op. at 10 (Mass. Super. Ct. Dec. 4, 2003).

In support of his petition for federal habeas corpus relief, Fusi alleges ineffective assistance of counsel based on the fact that, at the hearing for the second motion for a new trial, Atty. Chambers stated that during the trial he tried to contact witnesses who had exculpatory evidence but, 17 years later, admitted, in an affidavit, that, in fact, he had conducted no investigation of the case except for visiting the crime scene.[1] Fusi presented that argument to the

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[1] Fusi contends that, at the time of the second motion for a new trial in 1985, Atty. Chambers was under investigation by the Board of Bar Overseers for misconduct and only after he was formally disbarred was he willing to disclose the true nature of his mishandling of Fusi's case. At the hearing on the pending motions, Fusi also suggested that Atty. Chambers would be "more truthful" about his misconduct at the proposed evidentiary hearing but, to the extent such evidence "fundamentally alter[s]" Fusi's claim of ineffective assistance of counsel, it has not been "fairly presented" to the state courts. *Vasquez* v.

(Continued on following page)

trial court in his fifth motion for a new trial. The denial of that motion was affirmed by the Massachusetts Appeals Court and the SJC, again, denied further appellate review. *See Commonwealth* v. *Fusi,* 857 N.E.2d 1094 (Mass. 2006); *Commonwealth* v. *Fusi,* 854 N.E.2d 1266 (Mass. App. Ct. 2006).

In support of his motion for an evidentiary hearing in connection with his petition, Fusi argues that Atty. Chambers did not attempt to contact Leonard and Catherine Bartolo ("the Bartolos"), behind whose residence the victim was allegedly raped. Fusi asserts that the Bartolos would have been available to testify at his trial, if summonsed, and would have offered testimony in conflict with that of the victim with respect to the source of light in their backyard and whether she screamed on the night of the alleged rape.

As further evidence of Atty. Chambers' alleged ineffective representation, Fusi points to Atty. Chambers' failure to obtain and/or refer to the six-page statement the victim gave to the police. That statement contains details that are inconsistent with the victim's testimony at trial, specifically concerning: 1) the length of time a) she had been walking before she encountered her assailant, b) she lay on the

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Hillery, 474 U.S. 254, 260 (1986); *Picard* v. *Connor,* 404 U.S. 270, 275 (1971); *Jones* v. *Maloney,* 644 F. Supp. 146, 148 (D. Mass. 1986). Under the exhaustion requirement pertaining to habeas corpus petitions, 28 U.S.C. § 2254(b), this Court is, therefore, unable to consider it.

ground after her assailant left and before she walked out to the street and c) between the rape and when she went to the police, 2) whether the victim was able to describe the color of her assailant's eyes and 3) whether the assailant slapped the victim in the backyard.

In addition, Fusi notes that Atty. Chambers had little time to prepare for trial because he was assigned to the case only two days before jury empanelment by the lawyer Fusi had originally retained. Moreover, Atty. Chambers did not discuss the strategy of his defense with Fusi until the first day of trial and made no investigation of the case except for visiting the scene of the crime, interviewing Fusi's mother and sister and reviewing the police reports and grand jury minutes.

II. Legal Analysis

A. Legal Standard

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, district courts have some discretion in granting evidentiary hearings to habeas petitioners. *See* Rule 8 of the Rules Governing § 2254 Cases in United States District Courts; *Teti* v. *Bender*, 507 F.3d 50, 61 (1st Cir. 2007). However, if a petitioner "has failed to develop the factual basis of a claim in State court proceedings", AEDPA expressly prohibits evidentiary hearings unless the petitioner shows that:

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). A failure to develop the factual basis of a claim exists where the petitioner or his counsel was not "diligent in his efforts", meaning he or she did not make "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court". *Williams* v. *Taylor,* 529 U.S. 420, 435 (2000).

If a petitioner successfully develops the factual basis of a claim, and thus is not subject to § 2254(e)(2), the Court must then consider

> whether [an evidentiary] hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.

Teti, 507 F.3d at 62, quoting *Schriro* v. *Landrigan,* 127 S. Ct. 1933, 1940 (2007). Factual allegations

entitle a petitioner to habeas relief if they are "sufficient to overcome AEDPA deference to state court's factfindings and legal conclusion to the contrary". *Teti,* 507 F.3d at 62. The petitioner is not required to "point to specific facts he *will* establish that will entitle him to relief". *Teti,* 507 F.3d at 62. If the petitioner meets that standard, the district court may (but is not required to) grant an evidentiary hearing. *Pike* v. *Guarino,* 492 F.3d 61, 70 (1st Cir. 2007).

The subject deference afforded by AEDPA results from the statute's requirement that federal habeas relief be granted only where a state court adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States", 28 U.S.C. § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding". 28 U.S.C. § 2254(d)(2). It is presumed that Fusi relies here on the former rather than the latter statutory provision.

The issue in this habeas petition is whether Fusi was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The landmark federal case is *Strickland* v. *Washington,* 466 U.S. 668, 687 (1984), which provides that, in order to succeed on a claim of ineffective assistance of counsel, a petitioner must show that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. The element of deficiency requires that

> counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment . . . [i.e.] that counsel's representation fell below an objective standard of reasonableness.

Id. at 687-88. The element of prejudice requires that "counsel's errors were so serious as to deprive [petitioner] of a fair trial", or, in other words, that there is a reasonable probability that but for counsel's unprofessional conduct the outcome would have been different. *Id.* at 687. A reasonable probability is one "sufficient to undermine confidence in the outcome" but not just "some conceivable effect on the outcome of the proceeding". *Id.* at 693-94.

In cases where trial counsel's deficiency results in a failure on cross-examination of the government's witnesses, prejudice is determined by reference to three factors: 1) "the strength of the prosecution's case", 2) "the effectiveness of the defense that was presented at trial" and 3) "the potential value of the new evidence and new avenues for cross-examination in undermining the credibility of the government witnesses' testimony". *Dugas* v. *Coplan,* 506 F.3d 1, 9 (1st Cir. 2007) (internal quotation marks and citation omitted).

B. Application

The Court concludes that Fusi has successfully developed the factual basis of his claim of ineffective assistance of counsel because he 1) presented

evidence in support of his claim at a hearing on his second motion for a new trial, 2) submitted similar evidence along with his fifth motion for a new trial and 3) requested an evidentiary hearing in connection with that motion for a new trial (although that request was denied). *See Williams,* 529 U.S. at 437 ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court. . . ."); *Pike,* 492 F.3d at 69 (petitioner successfully developed a factual basis by presenting affidavits at a state court evidentiary hearing).

Therefore, Fusi is not required to meet the heightened standard set forth in 28 U.S.C. § 2254(e)(2). Instead, he must simply demonstrate that he has alleged facts sufficient to overcome AEDPA's deference to the state court's denial of his claim of ineffective assistance of counsel. Notwithstanding the fact that Fusi is confronted by the less onerous standard, the Court concludes that he has failed to satisfy it.

Fusi alleges that, if afforded an evidentiary hearing, he would present the following witnesses:

> 1) Atty. Chambers, who will testify that he did not conduct an investigation, attempt to confer with the government's witnesses, impeach the victim using a statement she made to the police or confer with the petitioner until the day of trial;
>
> 2) the petitioner's mother and sister, who will testify that Atty. Chambers contacted

> them two days prior to trial asking a number of questions about the case that they could not answer;
>
> 3) Leonard Bartolo, who will testify that he was never contacted by Atty. Chambers but had information directly contradicting the trial testimony of the victim and police witnesses, as described above; and
>
> 4) the petitioner, who will testify concerning Atty. Chambers' lack of preparation prior to trial.

Such evidence, even if true, would not, however, be sufficient to show that the state court's denial of a new trial for Fusi was contrary to, or involved an unreasonable application of, the Supreme Court precedent of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). The evidence may well be sufficient to satisfy the first prong of *Strickland* by demonstrating that Fusi's counsel was deficient. *See Dugas* v. *Coplan,* 428 F.3d 317, 328-32 (1st Cir. 2005) (finding trial counsel deficient for failing to investigate fully evidence that could have presented a valid defense); *Horton* v. *Allen,* 370 F.3d 75, 87 (1st Cir. 2004) (noting that "[i]n some instances, the failure of defense counsel to interview witnesses can establish the deficient performance prong of the *Strickland* analysis"); *United States* v. *Santiago,* 474 F. Supp. 2d 209, 213-14 (D. Mass. 2007) (failure to interview crucial witnesses satisfied *Strickland*'s deficiency prong).

The state court was not, however, unreasonable in finding that the evidence fails to satisfy the second

prong of *Strickland,* which requires Fusi to show he was prejudiced by Atty. Chambers' representation. Indeed, Fusi has failed to carry his burden of proving that Atty. Chambers' deficient lawyering was so serious as to undermine confidence in the rape conviction. *See Stephens* v. *Hall,* 294 F.3d 210, 225 (1st Cir. 2002) (finding no prejudice in a case that rested primarily on the victim's credibility where trial counsel failed to cross-examine the victim about her criminal history but impeached her credibility by other means); *cf. Matthews* v. *Rakiey,* 54 F.3d 908, 927, 930 (1st Cir. 1995) (finding prejudice existed in a rape case based primarily on the victim's identification of the defendant where counsel failed to produce any alibi or character witnesses and conducted only limited, ineffective cross-examination).

It is most significant to point out here that the Commonwealth presented a solid case against Fusi. It proved that the victim reported the rape promptly and that the victim's description of her assailant was entirely accurate in several respects, including hair style and color, build, age and attire. The victim specifically and unequivocally identified Fusi on multiple occasions.

Moreover, Atty. Chambers was able to impeach the victim at trial. He pointed out inconsistencies in her description of Fusi as her assailant when compared with his actual appearance. He also presented alibi witnesses to suggest that the victim's identification of Fusi was implausible. Moreover, the jurors were aware that the victim's ability to identify Fusi

as her assailant was impaired because she had been drinking beforehand and had been dealt a blow that had knocked her temporarily unconscious. They also were made aware that the victim originally failed to pick Fusi out of a yearbook containing his photographs.

Although Atty. Chambers' impeachment of the victim probably would have been more effective had he utilized other evidence such as the Bartolos' testimony or the victim's six-page statement, it is unlikely that such evidence would have affected the outcome of the case. Minor discrepancies between a statement given shortly after the rape and the testimony at trial over two years later is not likely to have created a reasonable doubt in the jurors' minds. Similarly, it is implausible that reasonable doubt would have arisen from testimony that a scream outdoors in the middle of the night went unnoticed by an older couple asleep inside a nearby house or from conflicting testimony concerning the lighting of the Bartolo's backyard.

Moreover, even if the question of prejudice in Fusi's case could be considered a "close call" under the standard set forth in *Strickland,* AEDPA prohibits this Court from reaching an independent decision on that issue. *See Stephens,* 294 F.3d at 225. Rather, this Court is to decide only whether the state court's application of the standard was *unreasonable.* Within those constraints, this Court finds that Fusi's factual allegations, even if true, do not overcome the deference afforded by AEDPA to the state courts' determination that he failed to establish prejudicial

ineffective assistance of counsel. Thus, the Court concludes that an evidentiary hearing is unwarranted.

In the process of considering Fusi's motion for an evidentiary hearing, the Court has necessarily considered the merits of his petition for federal habeas corpus relief. In so doing, the Court has determined that Fusi is not entitled to such relief and, therefore, his petition will be dismissed.

ORDER

In accordance with the foregoing, Fusi's motion for an evidentiary hearing (Docket No. 24) is **DENIED** and his petition for habeas corpus (Docket No. 1) is **DISMISSED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated December 5, 2008

447 Mass. 1113, 857 N.E.2d 1094 (Table)

(The Court's decision is referenced in a "Supreme Judicial Court of Massachusetts Further Appellate Review" table in the North Eastern Reporter.)

Supreme Judicial Court of Massachusetts.

Commonwealth

v.

Alfred P. Fusi

November 30, 2006

Appeal From: 67 Mass.App.Ct. 1109, 854 N.E.2d 1266.

DENIED.

Docket No.: 04-P-544
Date: October 11, 2006
Panel: DUFFLY, SMITH & KANTROWITZ, JJ.
Case Name: COMMONWEALTH
v.
ALFRED P. **FUSI**

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In his appeal from the denial of a fifth motion for a new trial, the defendant seeks to revisit earlier claims of ineffective assistance of counsel and to introduce new evidence of trial counsel's failure to accurately detail his trial preparation in an earlier hearing on the effectiveness of his representation. We find both the new evidence and the defendant's claim unpersuasive and conclude that the motion judge properly denied the defendant's motion for a new trial.

Ineffectiveness of counsel requires both "serious incompetency, inefficiency, or inattention of counsel-behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer" and a finding that counsel's ineffectiveness has "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). The defendant claims, as he has in prior motions, that counsel was inadequately prepared for trial as a result of the relative brevity of the period between counsel's entry into the case and appearance at trial, as well as his failure to interview a potential witness. The same issue was raised in a similar manner in the

defendant's second motion for a new trial, which was denied then by the trial judge.

Despite the prior rejection of this argument, the defendant seeks to revisit the issue by providing new evidence that trial counsel lied during a 1986 evidentiary hearing on the defendant's second motion for a new trial. Where a defendant seeks to introduce new evidence, "[t]he evidence said to be new not only must be material and credible but also must carry a measure of strength in support of the defendant's position." Commonwealth v. Grace, 397 Mass. 303, 305 (1986) (internal citation omitted).

The defendant points to two differences between trial counsel's 1986 testimony and his current affidavit as evidence of untruthful testimony. First, the defendant contrasts trial counsel's 1986 testimony that he was unable to recall exactly how long before trial he received the defendant's case with his current assertion that he received the case two days prior to trial. Second, the defendant distinguishes between trial counsel's 1986 testimony that he visited the crime scene several times and attempted to speak with the Bartolos while there, and his most current affidavit, which mentions only that he visited the crime scene. These minor differences appear more a clarification of trial counsel's prior vagueness than a revelation of intentional subterfuge. We are inclined to agree with the motion judge who remarked that "[the] defendant may have alleged some inconsequential new fact, but the essence of his arguments are the same as those he has brought previously." (A.45) The new evidence

proffered falls short of materiality and lends no "measure of strength" to the defendant's arguments.

More importantly, the defendant has offered no evidence to contradict the trial judge's finding that "it does not appear that the Bartolos' testimony would have 'accomplished something material' for defendant." (R.A. 25-26) "A reviewing court extends special deference to the action of a motion judge who was also the trial judge," Commonwealth v. Grace, 397 Mass. at 307, and also to his evaluation of trial counsel's effectiveness, see Commonwealth v. Barnette, 45 Mass.App.Ct. 486, 493 (1998). "A judge's decision to deny a motion for a new trial . . . will not be disturbed unless a review of the defendant's case shows that the decision, if not reversed, will result in 'manifest injustice."' Commonwealth v. Watson, 409 Mass. 110, 114 (1991), quoting from Fogarty v. Commonwealth, 406 Mass. 103, 110 (1989). Given the defendant's failure to demonstrate a "manifest injustice" perpetrated by the findings of the trial judge, we see no reason to revisit a previously decided issue. Accordingly, we conclude that the motion judge properly denied the defendant's motion for new trial.

For these reasons, and for substantially those in the judge's memorandum of decision and in the brief of the Commonwealth, we affirm.

Order denying motion for new trial affirmed.

By the Court (DUFFLY, SMITH & KANTROWITZ, JJ,)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. **SUPERIOR COURT**
CRIMINAL ACTION
NO. 1981-03626

COMMONWEALTH

vs.

ALFRED P. FUSI

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

Nature of Proceedings

On November 23, 1981, the Commonwealth filed an indictment against Alfred P. Fusi charging him with the crime of rape. On February 17, 1984, after a trial on that charge, the jury returned a verdict of guilty, and the trial judge (Brady, J.) sentenced Fusi to a term of not less than fifteen nor more than twenty years at the Massachusetts Correctional Institution in Walpole (now Cedar Junction). That sentence was to be executed from and after a sentence Fusi was then serving for a conviction of aggravated rape and other related offenses that occurred in 1980.

Fusi now moves for a new trial pursuant to Mass. R. Crim. P. 30(b), and for an evidentiary hearing on that motion. For the reasons set forth below, defendant's motion for a new trial will be ***DENIED*** without an evidentiary hearing.

PROCEDURAL HISTORY

Because this Court declines to address defendant's argument on its merit, a recitation of the factual history supporting the rape charge and the value of defendant's allegations of error at the subsequent trial is not necessary. Those facts may be reviewed in any one of the several appellate judgments entered previously. What is necessary to understand this Court's decision, however, is "[a] comprehensive description of the labyrinthian procedural history of this case. . . ." *Commonwealth* v. *Deeran*, 397 Mass. 136, 137 (1986).

As noted above, Fusi was convicted of the crime of rape following a jury verdict on February 17, 1984. On February 23, 1984, Fusi filed his first notice of appeal from that verdict.

On April 18, 1984, while his notice of appeal was still pending, Fusi filed his first motion for a new trial. The trial judge (Brady, J.) denied this motion after a non-evidentiary hearing held on May 15, 1984.[1]

On October 3, 1984, the Appeals Court affirmed the judgment of the trial court. 18 Mass. App. Ct. 1114 (1984). The Supreme Court denied any further appellate review. 393 Mass. 1105 (1985).

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[1] Defendant's first motion for a new trial, pursuant to Mass. R. Crim. P. 30(b), argued that the jury improperly convicted him by considering evidence that the trial judge specifically instructed them not to consider.

Fusi filed a second motion for a new trial, with supporting affidavits, on December 12, 1985. On August 14, 1986, before Judge Brady had rendered a decision on defendant's second motion for a new trial, Fusi filed a motion to re-open evidence. That motion was allowed by Judge Brady. Moreover, on August 14, 1986, Fusi filed an amended motion for post-conviction relief with supporting affidavits.[2] Four days later, on August 18, 1986, defendant filed a memorandum of law in support of his second motion for a new trial. That amended motion was denied by Judge Brady on October 6, 1986.[3] On October 17,

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[2] Defendant argued in this motion for a new trial that he was denied his right to effective assistance of counsel, and he also set forth examples of alleged prosecutorial misconduct. Specifically, defendant asserted that his trial counsel failed to make certain objections and move for a mistrial, and that he failed to call certain witnesses to testify, or to even interview them. Defendant also argued that an allegedly exculpatory statement made by the victim to her boyfriend was not disclosed to him, thus constituting prosecutorial misconduct. Defendant also argued that he was entitled to a new trial because the jury improperly weighed the fact that he did not testify in his own defense at trial.

[3] Justice Brady specifically noted: "The simple answer is that, even if all these alleged acts [of trial counsel, leading to the claim of ineffective assistance of counsel] occurred, this Court does not find that trial counsel was close to 'falling measurably below that which might be expected from an ordinary fallible lawyer.'" Memorandum and Order dated October 6, 1986, at 7 (quoting *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974)). Justice Brady went on to find that the allegedly exculpatory evidence was not "material" and, thus, any alleged failure to disclose it did not amount to prosecutorial misconduct violating defendant's rights. Regarding defendant's assertion that the

(Continued on following page)

1986, Fusi filed a notice of appeal from the October 6 ruling.

On January 14, 1988, the Appeals Court affirmed defendant's conviction as well as the denial of his second motion for a new trial. 25 Mass. App. Ct. 1110 (1988).[4] The Supreme Judicial Court denied further appellate review at 401 Mass. 1104 (1988).

Fusi filed his third motion for a new trial on June 1, 1989 (captioned as a motion for release from unlawful confinement pursuant to Mass R. Crim. P. 30 (a)). On June 26, 1989, that third motion for a new trial was denied by Judge Brady who held, in a margin endorsement that, upon examining the cases cited, after hearing the parties, and after considering the principles set forth in *Commonwealth* v. *Pisa,* 384

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jury's verdict was based on improper considerations, Justice Brady held: "Applying the law to the case at bar, this Court must assume that the jury carried out its function properly, and will not disturb the jury's verdict on that ground." Memorandum and Order dated October 6, 1986, at 10.

[4] Defendant argued on appeal "(1) that the judge erred in refusing either to strike inadmissible hearsay concerning the defendant's gain of weight or to give a curative instruction about this evidence; (2) that the judge's failure to give a complete *Telfaire - Rodriguez* charge on identification evidence and to correct a prejudicial instruction on misidentification create[d] a substantial risk of a miscarriage of justice; and (3) that the motion judge (who was also the trial judge) improperly denied the defendant's second motion for a new trial without first conducting a post-verdict inquiry of the jury." Appeals Court Memorandum and Order Under Rule 1:28, Nos. 86-431 & 87-59, dated January 14, 1988, at 1.

Mass. 362 (1981), "there must be some finality in this case."[5]

On April 23, 1990, the Appeals Court once again affirmed the judgment entered in the trial court and affirmed the denial of the defendant's third motion for a new trial. 28 Mass. App. Ct. 1118 (1990).[6] The Supreme Judicial Court again denied further appellate review. 407 Mass. 1103 (1990).

On January 15, 1992, Judge Brady permitted defendant to file a late motion to revise and revoke his sentence. That motion was denied on April 9, 1992.

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[5] "Underlying the requirement that claims be raised at the earliest possible time is a belief that such a practice will aid in the proper allocation of limited legal and judicial resources. Any other practice would unfairly consume public resources without any corresponding benefit to the administration of justice. Common sense counsels against such a result." *Pisa*, 384 Mass. at 366.

Defendant had argued in his third motion for a new trial, *inter alia*, that improprieties at the Grand Jury proceeding deprived him of his art. 12 rights; that alleged impairments at that proceeding violated his Fourteenth Amendment due process rights; and that his trial counsel's failure to move to dismiss the indictment for the argued reasons constituted ineffective assistance of counsel, violating his rights under the Sixth Amendment and art. 12 of the Massachusetts Declaration of Rights.

[6] The Appeals Court concluded that defendant had waived his grounds for the appeal at issue by not raising them earlier, and that it was within the motion judge's discretion to refuse to overlook defendant's waiver. Appeals Court Memorandum and Order Under Rule 1:28, No. 89-P-1140, dated April 23, 1990, at 4.

Defendant filed his fourth motion for a new trial on September 12, 1996, though the motion was dated November 16, 1995. A hearing was held in the matter on September 12, 1996.[7] On September 23, 1996, Judge Brady denied that fourth motion for a new trial but ordered a re-sentencing hearing upon a finding that defendant's trial counsel had been ineffective with respect to the sentencing phase of the trial. On October 29, 1996, after a hearing, Judge Brady ordered that the initial sentence should stand. In October 1996, defendant filed a notice of appeal from the October 1996 ruling; however, he has not prosecuted that appeal.

Defendant filed the current motion for a new trial, his fifth, in March 2003, and a hearing was held in the matter on October 29, 2003. For the reasons set forth below, this Court declines to discuss the merits of defendant's arguments and will deny the motion without a hearing on principles contained in *Commonwealth* v. *Deeran,* 397 Mass. 136 (1986) and its progeny, that is, that defendant has not raised any

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[7] Defendant argued in this motion: (1) that he was denied his rights under the United States Constitution and the Massachusetts Declaration of Rights due to ineffective assistance of counsel during his sentencing; (2) that he was denied his rights when the trial judge instructed the jury that defendant was permitted "not to incriminate himself" by not testifying; (3) that he was denied his right to testify on his own behalf because his trial counsel prevented him from testifying; and (4) that his counsel's failure to request a jury instruction regarding "good faith error" in identifications constituted ineffective assistance of counsel.

issue not previously ruled on, and that, if there are new or fresh issues, those issues have been waived. This litigation must end.[8]

DISCUSSION

Generally, a motion for new trial may be granted "at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). Granting of a new trial is not an unlimited power, however, because "[a]ll grounds for relief claimed by a defendant under . . . [Rule 30(b)] shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion." Mass R. Crim. P. 30(c)(2). See also *Mains* v. *Commonwealth,* 433 Mass. 30, 33-34 (2000); *Commonwealth* v. *Amirault,* 424 Mass. 618, 639 (1997) (A "concern for finality demands that a defendant present every claim and argument he might fairly have had available to him the first time around, and not after the proceeding has run its course. . . ."); *Deeran,* 397 Mass. at 139 ("[A] defendant must assert all

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[8] "It has been a principle of long standing . . . that any issue that the motion judge considered on its substantive merits on a motion for a new trial and decided against a defendant will come before an appellate court as it would have if it had been raised on direct appeal." *Commonwealth* v. *Curtis,* 417 Mass. 619, 624-625 (1994).

reasonably available grounds for postconviction relief in his first rule 30 motion, or those claims are lost.").

Defendant's current motion, his fifth motion for a new trial, occurs after three appeals have been considered and rejected. In the current motion, defendant argues that he should be granted a new trial because: "(1) Officer Michael Annese's testimony during the trial was materially false, misleading and corrupt; (2) Officer Annese's investigation and arrest of Alfred Fusi was tainted with corruption and bias; (3) the District Attorney's Office withheld exculpatory evidence in violation of the defendant's discovery agreement and in violation of the defendant's constitutional due process rights; and (4) Mr. Fusi did not receive the constitutionally minimum quantum of legal counsel or assistance before and during the course of his trial held before this Court from February 8 trough February 17 in the year of 1984." Defendant's Motion for a New Trial filed March 4, 2003, at 1-2.

A. No New Issues Raised

"[A] motion for a new trial may not be used as a vehicle to compel a trial judge to review and reconsider questions of law which were . . . already reviewed by an appellate court. . . ." *Commonwealth* v. *McLaughlin*, 364 Mass. 211, 229 (1973). See also *Commonwealth* v. *Gagliardi*, 418 Mass. 562, 565 (1994); *Commonwealth* v. *Watson*, 409 Mass. 110, 112 (1991).

As noted above, defendant here argues in his fifth motion for a new trial that the police framed him and conducted a corrupt investigation, that the prosecution withheld exculpatory evidence from him, and that his trial counsel was ineffective. Defendant's second motion for a new trial also involved allegations of prosecutorial misconduct and ineffective assistance of counsel. Additionally, at his resentencing hearing in 1986, defendant claimed that the police framed him. In support of this motion for a new trial, defendant may have alleged some inconsequential new fact, but the essence of his arguments are the same as those he has brought previously. See *infra* notes 1, 2, 4, 5, & 7. "[W]e are able to say with particular assurance that the issues which [the defendant] seeks to raise on this appeal need not be considered by us because they could have been raised in the prior proceedings. . . . None of the matters now raised involves new evidence or claims of error that were not inherent in the earlier proceedings; indeed . . . his claim of ineffective assistance of counsel [is] but [a] variation[ ] on [a] theme[ ] previously played by the defendant to the courts." *Commonwealth* v. *Cepulonis,* 18 Mass. App. Ct. 919, 920 (1984) (citations omitted).

Defendant has had his day in court on the issues he raises, and this Court will not permit him to reargue them here. See *Gibson* v. *Commonwealth,* 377 Mass. 539, 541 (finding that the defendant was not permitted to bring new challenges on issues previously decided, once a direct appeal has occurred).

B. If There Is A New Issue, It Is Waived

Even if defendant can show that his fifth motion for a new trial contains genuinely fresh arguments, a point not conceded by this Court, any new issue raised by defendant was waived by him, for the reasons discussed below.

The waiver doctrine was "devised by this court for reasons which . . . go to the balance between the full realization of a defendant's rights and the community's interest in the finality of criminal judgments. The purpose of this doctrine would be greatly undermined if a motion judge could render it a nullity by choosing to brush past it in his move to the merits – whether . . . to reject or to affirm the claim." *Amirault,* 424 Mass. at 640. Prior to filing this motion, defendant has filed four separate motions for a new trial in this Court and three appeals, all of which have been denied.

As set forth by the Supreme Judicial Court, "once the [criminal justice] process has run its course – through pretrial motions, trial, posttrial motions and one or two levels of appeal – the community's interest in finality comes to the fore. ***The regular course of justice may be long, but it must not be endless.***" *Amirault,* 424 Mass. at 636-637 (emphasis added) (citing *Commonwealth* v. *Deeran,* 397 Mass. 136, 142 (1986)).[9] See also *Commonwealth* v. *Grace,* 397 Mass.

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[9] "When a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest that

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303, 306 (1986). Waiver under Rule 30 was "designed to achieve 'finality of convictions,' and to eliminate 'piecemeal litigation . . . whose only purpose is to vex, harass, or delay.'" *Deeran,* 397 Mass. at 142 (quoting Reporters' Notes to Mass R. Crim. P. 30(c)(2)). Indeed, "[t]he very purpose of the rule is to curtail successive and vexatious postconviction proceedings initiated by dissatisfied defendants who have already obtained review of their convictions on direct appeal." *Deeran,* 397 Mass. at 142 (citing *Commonwealth* v. *Layne,* 386 Mass. 291, 297-298 (1982), later proceeding at 391 Mass. 1001 (1984)). The doctrine manifests the Commonwealth's "valid interest in seeking a visible end to the criminal process. 'There must be a reasonable moment for a judgment to become final and a time beyond which further challenges must be barred.'" *Deeran,* 397 Mass. at 142 (quoting *Reddick* v. *Commonwealth,* 381 Mass. 398, 403 (1980)).

To determine whether defendant has waived an issue, the operative inquiry "is whether 'the theory on which his argument is premised has been sufficiently developed to put him on notice that the issue is a live issue.'" *Amirault,* 424 Mass. at 639 (quoting

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the guilty not only be punished but that the community express its condemnation with firmness and confidence. Moreover, a decision to reopen a matter long since adjudicated will often in effect resolve the dispute in favor of the accused because witnesses will have died, disappeared, their memories faded, or they may simply be unwilling once again to undergo the ordeal of testimony." *Amirault,* 424 Mass. at 637 (citing *Commonwealth* v. *Curtis,* 417 Mass. 619, 623 (1994).

Commonwealth v. *Bowler*, 407 Mass. 304, 307 (1990)). While this Court is able, under certain circumstances, to overlook waived issues, "[a] motion judge's discretion under rule 30(c)(2) to grant relief from such a waiver is limited if the conviction has already received appellate review." *Commonwealth* v. *LeFave*, 430 Mass. 169, 174 n. 5 (1999).

Additionally, the waiver doctrine applies equally to both constitutional and non-constitutional claims that defendant failed to raise in a prior motion for a new trial or on direct appeal. *Amirault*, 424 Mass. at 641; *Deeran*, 397 Mass. at 193. As such, this Court's consideration of defendant's arguments, which are deemed waived, must be limited to "extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." *Watson*, 409 Mass. at 112. Defendant's burden is to show "why 'this is a truly extraordinary case where consideration of the merits of [his motion for a new trial] is required.'" *Commonwealth* v. *Gagliardi*, 418 Mass. 562, 565 (1994), cert. denied, 513 U.S. 1091 (1995) (quoting *Watson*, 409 Mass. at 114). Defendant here has failed to do so.[10]

Each of defendant's arguments on this motion for a new trial were both known and available to him either at the time of trial, or shortly thereafter. At the

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[10] "Indeed, it seems to us that the defendant has already had his day in court as to these issues." *Gagliardi*, 418 Mass. at 567.

very least, defendant should have raised the issues in his second motion for a new trial, when he was able to retain counsel different from his trial counsel. Each of the affidavits submitted by defendant in support of this motion for a new trial support this conclusion, given the fact that each of these witnesses was available to testify at trial as to these very same issues. There is little information contained within those affidavits that defendant has obtained since the filing of the last motion for a new trial; and any information that is allegedly new, this Court deems to have been known or knowable either at trial or prior to the filing of the four preceding motions for new trial.

C. No Need For An Evidentiary Hearing

This Court has the discretion to rule on this motion for a new trial based on the materials submitted, without an evidentiary hearing, so long as defendant has not raised a "substantial issue." *Gagliardi,* 418 Mass. at 572 (quoting Mass. R. Crim. P. 30(c)(3)). The motion judge has discretion in deciding whether to allow an evidentiary hearing. *Gagliardi,* 418 Mass. at 572 (citing *Commonwealth* v. *Stewart,* 383 Mass. 253, 257 (1981)). See also *Commonwealth* v. *Rice,* 427 Mass. 203, 207 (1998) (allowing "broad discretion" in ruling on the motion in the absence of an evidentiary hearing). In determining whether such a "substantial issue" has been raised, this Court must consider not only "the seriousness of the issue asserted, but also . . . the adequacy of the defendant's showing on the issue raised.'" *Gagliardi,* 418 Mass. at 572 (quoting *Stewart,* 383 Mass. at 257-258).

In support of his motion for a new trial, defendant submitted allegedly exculpatory material including eight affidavits, hundreds of pages of trial and motion transcripts, and various materials dealing with discipline of his trial counsel for unrelated matters. In other words, defendant has submitted abundant and sufficient materials for a determination that he has not presented any new issues or, if so, that he has waived those issues. For that reason, an evidentiary hearing on the issues presented in this fifth motion for a new trial is not necessary.

CONCLUSION

Finality is a principle that is essential to the proper functioning of our criminal justice system. In this case, the principle of finality must be both emphasized and respected. See *Commonwealth* v. *Bray,* 407 Mass. 296, 300 (1990) (quoting *Teague* v. *Lane,* 489 U.S. 288, 309 (1989)).

ORDER

For the foregoing reasons, it is hereby ***ORDERED*** that defendant's motion for a new trial is ***DENIED*** without an evidentiary hearing.

/s/ Robert H. Bohn, Jr.
Robert H. Bohn, Jr.
Justice of the Superior Court

DATED: December 4, 2003

United States Court of Appeals
For the First Circuit

No. 09-1060

ALFRED FUSI

Petitioner-Appellant

v.

STEVEN O'BRIEN, Superintendent,
Massachusetts Department of Correction,
Old Colony Correctional Center

Respondent-Appellee

Before

Lynch, *Chief Judge,*
Torruella, Selya, Boudin, Gajarsa,* Lipez,
Howard and Thompson, *Circuit Judges.*

ORDER OF COURT

Entered: December 7, 2010

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en

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* Of the Federal Circuit, sitting by designation.

banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk